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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
A. The Regulatory Framework and Background	3
B. The Specialized Carrier Decision	6
C. Proceedings Below	9
ARGUMENT	11
I. The Decision Below Directly Conflicts With the Decisions of the Ninth and Third Circuits on the Lawful Scope of Specialized Carrier Service	12
II. The Lower Court Has Fundamentally Misconstrued the Governing Statute in Disregard of Its Language, Purpose and History	18
III. The Lower Court's Decision Will Seriously Impair the Regulatory Plan and Provision of Telephone Service at Affordable Rates	25
CONCLUSION	32

CASES AND ADMINISTRATIVE PROCEEDINGS: Page

Aerovias Columbianas Limitada, 52 C.A.B. 447 (1969) 24
Arrow Transp. Co. v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965) 25
AT&T, 9 F.C.C.2d 30 (1967) 5
AT&T v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976) 17, 28
AT&T v. *FCC*, 2d Cir., Nos. 77-4057, *et al.* 28
Bell Telephone Company of Pennsylvania v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) ..... passim
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 20
Carroll Broadcasting Co. v. *FCC*, 258 F.2d 440 (D.C. Cir. 1958) 15
Commissioner v. *Gordon*, 391 U.S. 83 (1968) 18
Consolidated Carriers Corp., 118 M.C.C. 695 (1973) .24, 26
Domestic Communications-Satellite Facilities, 35 F.C.C.2d 844, *recon. denied*, 38 F.C.C.2d 665 (1972) 8, 23
Doniphan Telephone Co. v. *AT&T*, 34 F.C.C. 950, 962 (1962), *aff'd*, 34 F.C.C. 949 (1963) 4
Eastern Microwave, Inc., 11 F.C.C. 2d 146 (1967) ... 23
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 25
FCC v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) ..... passim
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 15, 21
Flying Tiger Line, Inc. v. *CAB*, 204 F.2d 404 (D.C. Cir. 1953) 23, 24
Gradsky v. *United States*, 376 F.2d 993 (5th Cir. 1967) 28
Graphnet Systems, Inc., 61 F.C.C.2d 685 (1975) 23
Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238 (1944) 28
Idaho Power Comm'n v. *Idaho Power Co.*, 344 U.S. 17 (1952) 25
Microwave Communications, Inc., 18 F.C.C.2d 953 (1969), *recon. denied*, 21 F.C.C.2d 190 (1970) ... 5
MCI v. *FCC*, D.C. Cir., Nos. 76-2071, *et al.* 29
Michigan & Nebraska Transit Co., Inc., 119 M.C.C. 846 (1972) 26
Nader v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975) 17
Patterson v. *Lamb*, 329 U.S. 539 (1947) 25
Perkins v. *Standard Oil Company*, 487 F.2d 672 (9th Cir. 1973) 28

Page

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 25
Press Wireless, Inc. v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) 24
Press Wireless, Inc., 25 F.C.C. 1466 (1958), *aff'd per curiam sub nom. Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) 22, 24
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 23
Resale and Shared Use of Common Services, 60 F.C.C. 2d 261 (1976), *recon. denied*, 62 F.C.C.2d 588 (1977), *appeal pending sub nom. AT&T* v. *FCC*, 2d Cir., Nos. 77-4057, *et al.* 8, 28
Second Report and Order on CATV, 2 F.C.C.2d 735 (1966), *aff'd sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968) 31
Southern Pacific Communications Corp. v. *FCC*, D.C. Cir., Nos. 77-1195, *et al.* 29
Specialized Common Carrier Services, 29 F.C.C.2d 870, *recon. denied*, 31 F.C.C.2d 1106 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) ..... passim
Texas & P. Ry. v. *Gulf, C. & S.F. Ry.*, 270 U.S. 266 (1926) 21
Thorpe v. *Housing Authority*, 393 U.S. 268 (1969) ..12, 20
United States v. *FCC*, D.C. Cir., Nos. 77-1249, *et al.* .. 29
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 24
United States v. *Standard Oil Co.*, 332 U.S. 301 (1947) 25
Udall v. *Tallman*, 380 U.S. 1 (1965) 20
W. J. Dillner Transfer Co. v. *United States*, 214 F. Supp. 941 (W.D. Pa. 1963) 24
Washington Utils. & Transp. Comm'n v. *FCC*, 513 F.2d 1142 (9th Cir.) *cert. denied*, 423 U.S. 836 (1975) ..... passim
Western Union Int'l., Inc., 9 F.C.C.2d 156 (1967) ... 23
Williams v. *Lee*, 358 U.S. 217 (1959) 24

CONSTITUTION AND STATUTES:

Communications Act of 1934:
Section 1, 47 U.S.C. § 151 30
Section 214, 47 U.S.C. § 214 ..... passim

Page

Section 214(a), 47 U.S.C. § 214(a) 21
Section 214(c), 47 U.S.C. § 214(c) 12, 20-21
Section 303(a), 47 U.S.C. § 303(a) 12
Section 303(b), 47 U.S.C. § 303(b) 12, 20
Sections 307-09, 47 U.S.C. §§ 307-09 .....6, 19
Section 309, 47 U.S.C. § 309 26

Interstate Commerce Act, Section 1(18), 49 U.S.C. § 1(18) 21

28 U.S.C. § 1254(1) 2

U.S. Constitution, Art. I, Sec. 8 28

MISCELLANEOUS:

Brief for the FCC and the United States, in *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) 9

Brief for the FCC and the United States in *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) 7-8

FCC RULES:

Section 6.3, 47 C.F.R. § 6.3 (1st ed. 1939) 23
Section 21.2, 47 C.F.R. § 21.2 (1976) 3, 5
Section 21.500, et seq., 47 C.F.R. § 21.500, et seq. (1976) 23
Section 21.600, et seq., 47 C.F.R. § 21.600, et seq. (1976) 23
Section 21.706, 47 C.F.R. § 21.706 (1976) 19
Section 21.800, et seq., 47 C.F.R. § 21.800, et seq. (1976) 23
Section 21.1000, et seq., 47 C.F.R. § 21.1000, et seq. (1976) 23
Section 63.01, 47 C.F.R. § 63.01 (1976) 19

Hearings Before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 94th Cong., 1st Sess., March 11, 1975 9

Page

Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, March 21, 1977 9

MCI Comments, FCC Docket No. 18920, October 1, 1970 6

MCI Reply Comments, FCC Docket No. 18920, December 2, 1970 20

Opposition of the Government, Sup. Ct. No. 74-1550 ..8, 20

Opposition of MCI, Sup. Ct. No. 74-1229 8

President's Task Force on Communications Policy, *Final Report* (1968) 31

Supreme Court Rule 19(1)(b) 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner American Telephone and Telegraph Company requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet officially reported, appears at Appendix A to this

petition,[1] The decision of the Federal Communications Commission, which is reported at 60 F.C.C.2d 25, appears as Appendix B.[2]

JURISDICTION

The decision of the Court of Appeals, which constitutes its judgment in this case, was entered on July 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Ordinary long distance telephone service in the United States has been provided on a regulated, noncompetitive basis for over a half century. By statute, new competitors require prior FCC authority before they begin to operate, and the FCC may authorize a new carrier to provide only a particular type or "class" of service. Construing its own prior decisions and grants to "specialized carriers" the FCC held in this case that such carriers have been authorized to provide a class of service known as "private line" but have not been authorized to provide ordinary long distance telephone service. The question presented is:

Whether the Court of Appeals for the District of Columbia Circuit erred when, in direct conflict with decisions of the Ninth and Third Circuits, it determined that a leading specialized carrier is authorized

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[1] The appendices are separately bound in a companion volume cited as "Pet. App."

[2] A prior letter-order of the FCC, reaffirmed by its principal decision, is reprinted in the principal decision and appears at Pet. App. 70b.

to provide ordinary long distance telephone service, despite repeated pronouncements by the FCC that it has authorized specialized carriers to provide only private line service and has never authorized such carriers to provide ordinary long distance service and never found that such competition for that class of service would serve the public interest.

STATUTES INVOLVED

Pertinent provisions of the Communications Act appear as Appendix C.

STATEMENT OF THE CASE

A. The Regulatory Framework and Background

For over half a century, AT&T has managed and operated the interstate switched telephone network to provide "switched public message services" [3] throughout the United States in cooperation with local telephone companies.[4] The most familiar service is "MTS", or ordinary long distance service,[5] which

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[3] The FCC's rules define a "public message service" as one offered on "a non-exclusive message by message basis, contemplating a separate connection for each occasion of use." 47 C.F.R. § 21.2 (1976).

[4] AT&T and the local telephone companies, which include 23 Bell System operating companies and about 1,600 independent telephone companies, operate as partners and do not compete with each other; in general, AT&T carries the call over its interstate network between local exchanges, and the local operating company at the origin and destination cities is responsible for local distribution of the call through its local facilities.

[5] MTS means Message Telecommunications Service. WATS, or Wide Area Telephone Service, is another familiar switched public message service.

allows any person to use any telephone connected to the network in one city to call long distance to any other connected telephone in the destination city. The call travels over a complex network of intercity circuits and is routed by switching equipment along the most efficient path available. The caller must establish a new connection for each call and pays for MTS on a per call basis. See generally *Doniphon Telephone Co.* v. *AT&T*, 34 F.C.C. 950, 962 (1962), *aff'd*, 34 F.C.C. 949 (1963).

The unified switched public network has achieved extraordinary benefits for the public. By concentrating all of the MTS traffic on this integrated system, AT&T is able to utilize high capacity transmission systems and drastically reduce unit costs;[6] in fact, a long distance call costs less today than it did prior to World War II despite rising prices in almost every other field. Provision of MTS under regulation, on a noncompetitive basis, has also permitted nationwide MTS rates to be based on *average* costs so that along less heavily used routes, where the cost of providing service is relatively high, telephone service can be made available at affordable rates.[7]

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[6] For example, the investment for a small capacity cable system providing 1,800 two way voice circuits is about $17.22 per circuit mile, while the investment for a giant cable system providing 132,000 circuits is about $1.68 per circuit mile. Realizing such unit cost savings requires that sufficient traffic be concentrated on the main routes of the unified network to justify the necessary investment in high capacity systems.

[7] Without such rate averaging—which has been sanctioned by both the FCC and state regulatory agencies—long distance calls between many points, especially small cities and rural areas, would be much higher. In addition, the revenues generated by MTS contribute through the "separations" process to holding down local

In addition to services like MTS, AT&T and the local telephone companies have long provided various types of "private line" service.[8] A private line provides the user, for a fixed monthly charge, with an exclusive circuit or circuits available for communication by him between two or more fixed locations. For example, a "tie line" that connects a manufacturer's warehouse in Baltimore with its bookkeeping center in New York is a private line. Since the private line circuits are normally dedicated to the use of a particular customer, they can be tailored to meet his specialized needs such as the points to be connected, circuit capacity provided, and type of circuit.

Although MTS has always been provided on a regulated, non-competitive basis, the FCC has recently taken a different approach to private line service. In 1969, it allowed the respondent MCI to construct on an experimental basis a single system between Chicago and St. Louis to provide private line service. *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), *recon. denied*, 21 F.C.C.2d 190 (1970). In 1970, the FCC found itself faced with a large number of applications from so-called "specialized carrier" applicants—including MCI—seeking to provide private line service in competition with AT&T.

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telephone rates, particularly basic residential rates, throughout the country; this is accomplished by the use of interstate revenues to defray local costs under procedures approved by the FCC and state regulatory agencies. See *AT&T*, 9 F.C.C.2d 30, 88-94 (1967).

[8] A "private line service" is one "whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time." 47 C.F.R. § 21.2 (1976).

Under the Communications Act and this Court's decision in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), the new carriers could not provide such service or even initiate construction of the necessary facilities without first obtaining FCC authorization based on public interest findings of need and public benefit.[9] MCI, like other applicants, represented to the FCC that "MCI-type applicants propose to offer only customized point-to-point services and have no intention of attempting to compete with [AT&T] in providing local exchange or *long distance toll telephone service,* which account for the bulk of [AT&T] revenues." MCI comments, FCC Docket No. 18920, October 1, 1970, pp. 27-28 (emphasis added).

B. The Specialized Carrier Decision

Instead of holding hundreds of route by route hearings, the FCC determined to resolve the basic public interest questions posed by the applications and establish the framework for future specialized carrier operations in a single rulemaking proceeding. In its 1971 *Specialized Carrier* decision, the FCC created a new class of limited-service "specialized carriers" to provide private line service.[10] In the decision, the FCC

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[9] Section 214 of the Communications Act, 47 U.S.C. § 214, requires certificates of public convenience and necessity for new interstate "lines"—defined as "any channel of communication"—whether established by cable or radio. In addition, Sections 307-09 of the Act, 47 U.S.C. §§ 307-09, require station licenses based on public interest findings wherever radio frequencies are to be used. Specialized carriers use microwave radio to create lines and therefore need both certificates and licenses, and the FCC ordinarily makes a single public interest determination in such cases.

[10] *Specialized Common Carrier Services,* 29 F.C.C.2d 870, *recon. denied,* 31 F.C.C.2d 1106 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n* v. *FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975). The specialized carriers which have resulted

repeatedly said that it was authorizing specialized carriers to provide "private line" service; and its affirmative public interest findings, including the crucial finding of benefit required under *FCC* v. *RCA Communications, Inc.*, related specifically to "private line services proposed by [MCI] and other applicants."[11]

Conversely, in considering the possible adverse impact of the new competition, the FCC made clear that it was not authorizing specialized carriers to provide switched public message service such as MTS and therefore saw no threat of increased MTS rates for the public. Thus, it found the bulk of the Bell System's revenues came from services (MTS and WATS) "which the applicants do not seek to provide," whereas interstate private line revenues amounted to only about 4 percent of total Bell System revenues. 29 F.C.C.2d at 911. In addition, the Commission concluded that nationwide rate averaging used by the existing carriers for MTS and WATS would not be jeopardized (see p. 30, below), since the specialized carriers had not sought to provide such services. *Id.* at 915.

On review in the Ninth Circuit, the FCC and the Department of Justice represented that "the Commission's decision . . . to allow competition . . . involves essentially private line offerings as distinguished from local telephone exchange and long distance toll tele-

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from that decision are merely one of a number of classes of limited-service carriers which the FCC has created from time to time to provide particular types of common carrier service. See p. 23, below.

[11] 29 F.C.C.2d at 882, quoting staff analysis. Numerous other references to private line service in the *Specialized Carrier* decision are reprinted in a compilation contained in Appendix D to this petition. Pet. App. 8d-10d.

phone services." [12] In affirming the *Specialized Carrier* decision, the Ninth Circuit expressly adopted this interpretation. 513 F.2d at 1155-56. The same interpretation was adopted by the Third Circuit, after similar representations by the Government (Pet. App. 13d-15d), in reviewing a related, subsequent order of the FCC. *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250, 1254-55, 1273-74 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).[13]

Following the *Specialized Carrier* decision, the FCC has issued thousands of grants and licenses to specialized carriers in reliance on its main decision and without any further public interest findings. The applications and grants, excerpts of which are included in Appendix F to this petition, repeatedly either refer to private line service or incorporate by reference the *Specialized Carrier* decision itself. The central premise that the *Specialized Carrier* decision was confined to authorizing only private line competition has been repeated in subsequent FCC decisions,[14] in briefs submitted by the FCC and the Department of Justice in

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[12] Brief for the FCC and the United States, pp. 4-5, in *Washington Utils. & Transp. Comm'n* v. *FCC*, *supra*. MCI expressly adopted the Government's statement of facts in its own brief (p. 1).

[13] In addition, both the Government and MCI represented to this Court, in opposing certiorari, that the *Specialized Carrier* case was concerned with "private line" service. See opposition of the Government, Sup. Ct. No. 74-1550, pp. 2-3 (Ninth Circuit); opposition of MCI, Sup. Ct. No. 74-1229, p. 3 (Third Circuit).

[14] *E.g.*, *Domestic Communications-Satellite Facilities*, 35 F.C.C.2d 844, 853, *recon. denied*, 38 F.C.C.2d 665 (1972); *Resale and Shared Use of Common Services*, 60 F.C.C.2d 261, 293 (1976), *recon. denied*, 62 F.C.C.2d 588, 602-03 (1977), *appeal pending sub nom. AT&T* v. *FCC*, 2d Cir., Nos. 77-4057, *et al.*

at least three circuits [15] and to this Court (see p. 8, n. 13, above), and in statements by the FCC to Congress.[16]

C. Proceedings Below

Although MCI began to provide private line service in 1972, neither then nor later did MCI seek authority to provide MTS. Instead, beginning in late 1974, MCI sought to introduce a form of MTS under the pseudonym "Execunet." What MCI did was to connect its intercity lines to local telephone company exchanges at both ends,[17] configure the circuits so that any customer could utilize any telephone or intercity circuit

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[15] *E.g.*, "The *Specialized Common Carrier Services* proceeding involved rulemaking for the determination of basic, broad policies with respect to provision of the full range of private line services . . . ." Brief of the FCC and the United States, pp. 41-42, in *Bell Telephone Company of Pennsylvania* v. *FCC*, *supra*. Extracts from briefs of the Government in the Third, Ninth and District of Columbia Circuits appear at Pet. App. 10d, 12d-13d, 14d-15d.

[16] *E.g.*, "One thing you must understand—the competition we have introduced has been in the private line and not the message toll service . . . ." *Hearings Before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 1st Sess., March 11, 1975, p. 46 (Statement of Chairman Wiley). Various congressional statements reflect the same understanding. *E.g.*, "It should be emphasized that the private line and terminal equipment sectors of the industry are the only two areas that the FCC has opened to competition. The public telephone network has remained a regulated monopoly . . . ." *Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, March 21, 1977, p. 14 (Statement of Senator Hart).

[17] The specialized carriers use local facilities of the telephone companies to connect the end points of their intercity circuits with the customer's premises. However, use of the local facilities has been mandated only for the specialized carriers' authorized private line services. See *Bell Telephone Company of Pennsylvania* v. *FCC*, *supra*, 503 F.2d at 1273-74.

in turn, and thereby offer customers essentially the same service as they currently receive from MTS.[18]

As with MTS, an Execunet customer has access from any telephone in one city to any telephone in a distant city on a call-by-call basis. Pet. App. 31b-32b, 64b-70b. Subject to a monthly minimum charge, an Execunet customer, like the MTS customer, is charged for each call at a rate dependent on the distance called and the length of the call. *Id.* Neither Execunet nor MTS provides a customer with the exclusive use of an intercity circuit; the Execunet customer, like his MTS counterpart, uses whatever MCI intercity circuits are available, as well as local telephone switching facilities and circuits. *Id.*

After a lengthy investigation, the FCC released its decision in this case on July 13, 1976, unanimously affirming that Execunet was an unlawful service. *MCI Telecommunications Corp.*, 60 F.C.C.2d 25 (Pet. App. 1b).[19] In its detailed decision, the FCC construed its own *Specialized Carrier* decision and confirmed that specialized carriers such as MCI have been authorized to provide only private line service.[20] The FCC further

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[18] Charts comparing Execunet and MTS, introduced by AT&T in the FCC proceeding, appear at Appendix E to this petition. The chart of Execunet depicts its operation consistent with the FCC's own findings. See Pet. App. 2b-3b & n.1.

[19] Previously, the FCC had determined in a letter-order of July 2, 1975, that Execunet was beyond MCI's authority. Pet. App. 70b-76b. On review in the lower court, MCI raised new arguments; accordingly, the lower court held the case in abeyance so that MCI could make its full presentation to the FCC. The jurisdiction of the Court of Appeals rests on 28 U.S.C. § 2342.

[20] The FCC cited the language and reasoning of its own *Specialized Carrier* decision, which "makes it quite clear that we intended

found on the undisputed facts that Execunet had "all the essential characteristics" of switched public message service and none of the characteristics of private line service. Pet. App. 35b.

On July 28, 1977, the lower court reversed. It held that MCI was free to provide any service, including MTS, over the communication facilities which the FCC had previously authorized and held to be limited to private line service. Pet. App. 1a. The court did not deny that Execunet was a form of switched public message service (Pet. App. 26a), and it acknowledged that the FCC had never specifically authorized competition in the switched public message service field or found that such competition would serve the public interest. Pet. App. 29a, 31a. Nevertheless, the court asserted that the FCC could not grant authorization limited to proposed services without addressing the services the applicants do *not* propose to provide and affirmatively finding that it would be contrary to the public interest for them to provide such additional, never-proposed services. Pet. App. 29a-30a.

ARGUMENT

Certiorari is warranted and urgently required on several independent grounds. The lower court decision is in direct conflict with decisions of the Ninth Circuit and the Third Circuit. The latter two circuits clearly construed the *Specialized Carrier* decision as properly confined to authorizing private line service. That construction is supported by the language and reasoning

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and did open competition only in . . . private line services" (Pet. App. 20b), and the FCC relied directly on the decisions of the Ninth and Third Circuits. Pet. App. 22b-23b.

of the agency and by its consistent, subsequent administrative interpretation. See generally *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969).

In addition, the lower court's decision involves clear statutory error. The Communications Act permits applications to be granted "as applied for" (Section 214(c)) and allows the FCC to "classify" stations and services (Section 303(a), (b)). MCI-type carriers only applied for authority to provide private line service and have never been authorized to provide switched public message service. Contrary to *FCC* v. *RCA Communications, Inc.*, the lower court's reading of the statute would authorize competition for switched public message service, even though the FCC has never found that it would serve the public interest.

Finally, among numerous other adverse consequences, the lower court's decision undermines decades of settled practice by which limited service carriers have been created by the FCC and by similar agencies, and it threatens the validity of dozens of classifications and thousands of grants. Because of the lower court's statutory holding, this situation—which will cause serious administrative and judicial disruption—can be rectified only on certiorari and not by further agency proceedings.

I. The Decision Below Directly Conflicts With the Decisions of the Ninth and Third Circuits on the Lawful Scope of Specialized Carrier Service.

The holding of the District of Columbia Circuit, that specialized carriers are free to offer switched public message service, conflicts with the decisions of the Ninth Circuit in *Washington Utils. & Transp. Comm'n*

v. *FCC* and the Third Circuit in *Bell Telephone Company of Pennsylvania* v. *FCC*. In each case, the Government represented that the FCC had only authorized competition for private line service (see Pet. App. 10d, 14d-15d); and in each, this representation was an essential premise of the court's decision. Unquestionably, this is a case where a "court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter," so as to warrant review by this Court. Sup. Ct. Rule 19(1)(b).

The Ninth Circuit, in affirming the *Specialized Carrier* decision, expressly found:

> "The business involved is that of providing specialized *private or leased line* communication services through microwave transmission facilities *as distinguished from* public exchange and *long distance toll telephone service.*" 513 F.2d at 1155 (emphasis added).

Summarizing the FCC's own determinations, the Ninth Circuit stated that new entry in the specialized field would not adversely affect existing carriers because the specialized services in question represented only a "very small percentage of A.T.&T.'s total market" and "[t]he market for *standard voice communications services* is not affected."[21] The premise that specialized carriers were limited to private line service was essential to the Ninth Circuit's decision in two different respects.

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[21] *Id.* at 1156 n.21 (emphasis added). The court also stated that "[t]he record as a whole indicates that entry by more than one *private line carrier* should generally be reasonably feasible . . . ." *Id.* at 1167 n.33 (emphasis added).

First, the Ninth Circuit had to determine whether the introduction of new competition rested on a showing of public interest need, as required by the Act and by this Court in *FCC* v. *RCA Communications, Inc.*[22] The Ninth Circuit found that the FCC had made such a showing with respect to private line service.[23] The Ninth Circuit did not and could not make any such finding with respect to switched public message service. Thus, had the FCC authorized such competition in the *Specialized Carrier* decision, the Ninth Circuit would have been compelled to reverse based on its own reasoning and the principles of *RCA*.

Second, the Ninth Circuit took note of the FCC's ultimate finding that "there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers" so as to outweigh the benefits of new entry. 513 F.2d at 1155-56. However, as the Ninth Circuit recognized, this determination itself rested on subsidiary FCC findings confirming that specialized carrier competition would

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[22] The *RCA* decision, which the Ninth Circuit canvassed at length (513 F.2d at 1158-59), determined that Congress had not intended the FCC to permit new common carrier entry merely on the assumption that "competition is bound to be of advantage . . . ." 346 U.S. at 97. Rather, this Court found that "the Commission must at least warrant . . . that competition would serve some beneficial purpose" and that there be "ground for reasonable expectation" that this benefit would be achieved. *Id.* at 97.

[23] The Ninth Circuit quoted the FCC's ultimate finding that "a public need and demand [existed] for the proposed facilities and services" (513 F.2d at 1155) and summarized the supporting subsidiary findings, including the FCC's view that existing carriers alone might not meet the needs of the specialized market "and still meet the increasing requirements of the public monopoly services [MTS and WATS] . . . ." *Id.* at 1156 n.21.

not include MTS.[24] If these findings had not been accepted, the Ninth Circuit clearly could not have affirmed. *Id.* at 1159-60.[25]

The lower court decision also conflicts with the decision of the Third Circuit in *Bell Telephone Company of Pennsylvania* v. *FCC*. There, the Third Circuit had before it an order requiring local telephone companies to provide local distribution facilities to specialized carriers (see p. 9, n. 17, above) for two types of service denominated FX and CCSA (described at 503 F.2d at 1254 n.4). The scope of the *Specialized Carrier* decision was directly in issue because the telephone companies claimed that it did not authorize specialized carriers to provide FX or CCSA service. The telephone companies also argued that the FCC's interconnection order before the court was too broad and ambiguous to be sustained.

The Third Circuit concluded that the *Specialized Carrier* decision was co-extensive with private line service and therefore included FX and CCSA because

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[24] In summarizing the supporting findings, the Ninth Circuit mentioned *inter alia* the small percentage of the market involved (*id.* at 1156 n.21), an obvious reference to the FCC's determination that private line services being opened to competition represented only 4 percent of Bell System revenues. 29 F.C.C.2d at 911. In noting that "[t]he market for standard voice communications service is not affected" and this "accounts for the bulk of A.T.&T.'s revenue" (513 F.2d at 1156 n.21), the Ninth Circuit necessarily referred to the FCC's finding that MTS and WATS represented 87 percent of Bell System interstate revenues (29 F.C.C.2d at 911) and were services the FCC did not authorize the specialized carriers to provide. *Id.* at 915.

[25] See generally *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476 (1940); *Carroll Broadcasting Co.* v. *FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958).

the FCC deemed them to be private line services. In parsing the *Specialized Carrier* decision, the Third Circuit found that specialized carriers were permitted to provide services "within the rubric of 'private line services'" (503 F.2d at 1260-61), and that the FCC's evaluation demonstrated that "the public interest favored the entry of specialized carriers into the full field of private line services." *Id.* at 1270. If the Third Circuit had regarded the *Specialized Carrier* decision as authorizing competition for *any* service including MTS, then its entire course of reasoning would have been superfluous and mistaken.[26]

Moreover, the Third Circuit made clear that it was rejecting the overbreadth and vagueness attacks on the interconnection order *because* of the limited class of competitive services involved. The Third Circuit's decision said that it "would be inclined to agree with [the telephone companies] that the order is somewhat vague and, to a certain extent, overbroad" if the order were read in the abstract. 503 F.2d at 1273. However, it found that the order took on adequate specificity as a result of its context, which related the order to the FCC's determination to permit "competition in the provision of the interstate private line communications . . . ." *Id.* (quoting the FCC's own description of the *Specialized Carrier* case).

In light of the language and reasoning of the Ninth and Third Circuit decisions, the lower court in this case

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[26] Not only would it have been unnecessary for the Third Circuit to ascertain that the *Specialized Carrier* decision included the "full field" of private line services (see *id.* at 1270), but it would have been pointless for the Third Circuit to consider carefully, as it did, whether FX and CCSA fell within the private line "rubric." See *id.* at 1261.

clearly erred when it sought to distinguish those decisions on the ground that the "issues" in those cases differed. Pet. App. 25a-26a n.59. The Ninth and Third Circuits did consider and had to conclude, as their own language and reasoning showed, that the specialized carriers had been authorized to provide private line service but that competition beyond this boundary had not been contemplated or authorized. Accordingly, there is a direct conflict among the circuits.[27]

The conflict in the circuits is not limited to an abstract or hypothetical disagreement. If the lower court's view of the *Specialized Carrier* decision were correct, that decision—which is the basis for all of MCI's subsequent grants—would not have been sustained by the Ninth Ciruit, and today MCI could offer no service whatever, let alone Execunet. See p. 14, above.[28] In short, the conflict has produced a result re-

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[27] In fact, prior to the present case, the District of Columbia Circuit had itself rendered decisions that are inconsistent with the decision below. In *Nader* v. *FCC*, 520 F.2d 182, 187 (D.C. Cir. 1975), the court stated that "MTS and WATS are essentially monopoly services . . . . AT&T's [other] interstate revenue accrues from private line service . . . . Unlike MTS and WATS, several specialized carriers, including MCI, compete with AT&T in this part of the market."

In an even more recent decision, the court construed the *Specialized Carrier* decision thusly: "In announcing a general policy in favor of competitive entry the Commission decided broadly [in the *Specialized Carrier* case] that the public interest, convenience, and necessity would be served by permitting specialized common carriers to provide a full range of *private line* communications services . . . ." *AT&T* v. *FCC*, 539 F.2d 767, 773-74 (D.C. Cir. 1976) (emphasis added).

[28] The FCC's findings and the Ninth Circuit's affirmance clearly do not provide a public interest basis for authorizing competition

specting Execunet itself that is logically impossible and creates a special warrant for Supreme Court review to resolve the conflict. *Commissioner* v. *Gordon*, 391 U.S. 83 (1968) (conflict on tax consequences of same transaction).

Finally, the conflict involves a serious element of misdirection. If the District of Columbia Circuit decision stands, then the Ninth and Third Circuit each acted on the basis of crucial misstatements by the Government and MCI concerning the scope of the *Specialized Carrier* decision. See Pet. App. 1d-16d. Indeed, the representations were repeated not only in the circuit courts but to this Court as well when the Government and MCI successfully opposed certiorari from the Ninth and Third Circuit decisions. See p. 8, above. Accordingly, judicial review of this conflict is required in order to vindicate the courts' own processes.

II. The Lower Court Has Fundamentally Misconstrued the Governing Statute In Disregard of Its Language, Purpose and History.

In holding that MCI could provide any service it chose, the lower court construed the Communications Act as precluding the FCC from granting a carrier only limited authority—even though the carrier had applied only for limited authority—"unless [the FCC] has affirmatively determined that 'the public conve-

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for switched public message services such as MTS, a necessary predicate under the Act and *RCA* for validly authorizing unlimited service. See p. 14, above. Accordingly if MCI's certificates are read as unlimited, then they are themselves invalid.

nience and necessity [so] require' " such a limitation. Pet. App. 24a. Since it discerned no such "affirmative determination" in the *Specialized Carrier* decision (*id.* at 29a-30a), the lower court concluded that MCI was free to provide switched public message service including MTS. The lower court's reading of the statute is at odds with the language of the Act, with its purpose, with rationality, and with the FCC's continuing administrative construction of the Act for almost half a century.

The Communications Act clearly forbids a carrier to construct or operate any channel of communication (Section 214) or transmit any radio signal (Sections 301, 307-09) until the FCC has determined that the public interest so warrants. In determining whether the public interest would be served, the FCC necessarily must first determine what service or class of services the carrier proposes to provide, so that it can evaluate the public interest need and any adverse effects that may result. Not surprisingly, Section 63.01 of the FCC's rules, which specifies the "contents of applications" under Section 214 of the Act, provides that the application shall include a statement of "the nature and classification of the communication services to be provided (e.g., . . . *private line* . . . etc.)." [29]

In the *Specialized Carrier* case, the FCC was confronted with applications from MCI-type carriers

[29] 47 C.F.R. § 63.01 (1976) (emphasis added). Similarly, Section 21.706 of the FCC's rules which includes requirements for applications to establish radio stations in the frequencies utilized by MCI, requires the applicant to specify "[t]he nature and type of services to be rendered (e.g., . . . *private line* . . . etc.)." 47 C.F.R § 21.706 (1976) (emphasis added).

solely to provide private line service.[30] The FCC's language and its findings, both as to need and adverse effect, contemplated that only private line service was being authorized. See p. 7, above. The FCC has repeatedly and uniformly construed its decision in this way.[31] Accordingly, the only remaining question is whether such a limited grant of authority could lawfully be made in the absence of the "affirmative determination" which the lower court deemed necessary under the statute.

Section 214(c) of the Act expressly states that the Commission "shall have power to issue such certificate as applied for"; and Section 303(b) of the Act, also expressly relied on in the *Specialized Carrier* decision (29 F.C.C.2d at 941), allows the FCC to prescribe "the nature of the service to be rendered by each class of licensed stations and each station within any class." Since the MCI-type carriers had only sought authority to provide private line service, the FCC was entitled under the plain language of the Act to establish such

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[30] MCI itself stressed that it was not seeking authority to provide "long distance toll telephone service" (see p. 6, above), and it also said that "the switched voice services" were the field "which we do not seek to enter." MCI reply comments, FCC Docket No. 18920, Dec. 2, 1970, p. 27. Similarly, the Government advised this Court that the FCC was faced with "40 applications . . . collectively seeking more than 1,700 licenses" in order "to provide a variety of interstate private line services." Opposition of the Government, Sup. Ct. No. 74-1550, pp. 2-3.

[31] In view of the repeated references to private line service in the decision and its uniform interpretation in subsequent FCC decisions (see Pet. App. 8d-9d, 11d-12d), the FCC's construction of the intent of the decision is controlling. *E.g.*, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 276 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

a "class" and grant MCI authority "as applied for." [32] Nothing in the statute compelled the Commission to make any qualifying "affirmative determination" when it granted limited authority to the specialized carriers to do only what they themselves had proposed.[33]

The purpose of the Act also supports the FCC's understanding. In requiring prior approval, Congress recognized "that competition between carriers may result in harm to the public as well as in benefit" and "that when a [carrier] inflicts injury upon its rival, it may be the public which ultimately bears the loss." [34] Yet, on the lower court's reading, the FCC authorized duplicative new facilities to provide com-

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[32] In affirming the *Specialized Carrier* decision, the Ninth Circuit observed that "the Commission may determine general questions relating to the public interest, convenience, and necessity in rulemaking proceedings; and, specifically, may determine that competition in the furnishing of *a class of regulated service* will lead not to poorer but to better service to the public, and will otherwise be in the public interest." 513 F.2d at 1166 (emphasis added).

[33] The lower court's two statutory references to support its "affirmative determination" requirement are more puzzling than persuasive. It said that the FCC must "strictly follow the terms of Section 214(c)" (Pet. App. 24a), but that provision itself says the FCC may grant the certificate "as applied for" and does not refer to "affirmative determinations." The court also relied on "the final proviso" of Section 214(a) (*id.* at 23a), but that merely permits carriers to make minor alterations in the course of providing existing service and has nothing to do with attempts to provide new services beyond the scope of the carrier's basic authority.

[34] These grounds are attributed by this Court to Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), which was the direct predecessor of Section 214 of the Communications Act. *Texas & P. Ry.* v. *Gulf, C. & S.F. Ry.*, 270 U.S. 266, 277 (1926) (Brandeis, J.). See also *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940) (analogizing the regulation of rail and telecommunications common carriers).

petition for MTS even though on the lower court's own view the FCC has never determined whether such "competition between carriers" would result in harm or benefit or whether it would inflict "injury" resulting in public "loss." Compare *FCC* v. *RCA Communications, Inc., supra,* 346 U.S. at 96-97.[35]

The lower court's construction also fails the test of rationality. It would be time-consuming and pointless for an agency, asked to authorize new facilities or radio transmission for a limited use or service, to make affirmative determinations about other uses or services neither requested by the applicant nor intended to be authorized by the agency. If and when a limited service carrier wishes to expand operations beyond the scope of its basic authority, it can always return to the agency and apply for a broader certificate upon a showing that such a grant would serve the public interest.[36] Delay and needless litigation would result if the agency were forced, before granting a limited service certificate, to make findings about myriad other possible activities which the carrier has not sought to provide and which the agency does not propose to au-

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[35] The lower court's reading is especially incongruous because the *Specialized Carrier* decision, in its references to switched public message service, recognized the serious public interest problems that would be presented by MTS competition and made clear that no such competition was being authorized. 29 F.C.C.2d at 910-15.

[36] Contrary to the lower court's suggestion, this procedure is not in any respect "in derogation of" the tariff filing provisions of the Act. (Pet. App. 24a). Although new tariffs may be filed on the carrier's own initiative, the tariff filing provisions "presuppose that a tariff tendered for filing relates to communications subject to the act which a carrier may legally handle." *Press Wireless, Inc.*, 25 F.C.C. 1466, 1472 (1958), *aff'd per curiam sub nom. Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959).

thorize. See *Flying Tiger Line, Inc.* v. *CAB*, 204 F.2d 404 (D.C. Cir. 1953).

In addition, the lower court's decision disregards the FCC's understanding of the Act reflected in the entire history of FCC classification of, and grants to, limited service carriers. Compare *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The FCC has repeatedly created classes of common carriers to provide only limited types of service;[37] and it has done so in numerous different ways including codified rule,[38] general rulemaking proceedings,[39] and decisions and grants in individual cases.[40] So far as we are aware, the FCC has never in any of these situations made the "affirmative determination" which the lower court now deems to be necessary, *i.e.*, that it would be contrary

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[37] For example, a class of limited service carriers "to provide fixed public press service" was provided for in the first set of rules adopted by the FCC, on July 11, 1934, reflecting a similar classification in the rules of the superseded Federal Radio Commission. See 47 C.F.R. § 6.3 (1st ed. 1939).

[38] Examples include carriers designed to carry radio and TV signals between broadcast stations, 47 C.F.R. § 21.800, *et seq.* (1976); carriers to provide rural radio services, 47 C.F.R. § 21.600, *et seq.* (1976); carriers to provide land mobile radio telephone service, 47 C.F.R. § 21.500, *et seq.* (1976); and carriers to provide telephone service to off-shore oil drilling rigs, 47 C.F.R. § 21.1000, *et seq.* (1976).

[39] Examples include both the *Specialized Carrier* decision and the FCC's decision creating counterpart private line carriers using domestic satellite facilities. See *Domestic Communications-Satellite Facilities, supra.*

[40] Examples include so-called international record carriers which provide services such as teletype and fascimile to foreign countries, *e.g.*, *Western Union Int'l, Inc.* 9 F.C.C.2d 156 (1967), so-called value-added carriers, *e.g.*, *Graphnet Systems, Inc.*, 61 F.C.C.2d 685 (1976), and carriers to transmit signals to CATV systems, *e.g.*, *Eastern Microwave, Inc.*, 11 F.C.C.2d 146 (1967).

to the public interest for the limited service carrier to provide services which it has never proposed to provide. Nor are such findings made by other licensing agencies when they authorize limited service carriers under parallel statutory provisions.[41]

Until today, the courts and agencies have uniformly understood that a carrier, authorized to provide a particular service or class of service, was limited to that service or class of service unless and until it returned to the agency, filed a new application, and obtained an expansion of its basic authority.[42] The lower court's departure from this long-standing construction involves an important question of regulatory authority appropriate for this Court's review (*United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 161 (1968)) and represents so "doubtful [a] determination" of an important question that certiorari is doubly warranted. *Williams* v. *Lee*, 358 U.S. 217, 218 (1959).

Finally, it should be emphasized that the lower court's decision in this case is indefensible even if—contrary to fact—the lower court's construction of the Act and the *Specialized Carrier* decision were correct.

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[41] *E.g.*, *Consolidated Carriers Corp.*, 118 M.C.C. 695 (1973) (motor carrier authorized to carry "wearing apparel and materials, supplies, and machinery used in the manufacture thereof" between designated points but no "affirmative determination" excluding other commodities); *Aerovias Colombianas Limitada*, 52 C.A.B. 447 (1969) (authority to carry property and mail between specified points but no "affirmative determination" excluding passengers).

[42] See *Press Wireless, Inc.*, v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) *affirming Press Wireless, Inc.* 25 F.C.C. 1466 (1958) (FCC). *Flying Tiger Line, Inc.* v. *CAB*, 204 F.2d 404 (D.C. Cir. 1953) (CAB); *W. J. Dillner Transfer Co.* v. *United States*, 214 F. Supp. 941 (W.D. Pa. 1963) (ICC).

Even if the *Specialized Carrier* decision was deficient in seeking to limit the specialized carriers to private line service, the court could not lawfully determine on this basis that MCI held authority to provide unlimited service. Instead, consistent with the allocation of authority between courts and agencies, the lower court could only have invalidated MCI's authority as a whole and allowed the FCC to decide afresh what authority, if any, should be afforded to MCI. See *Idaho Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952).[45]

III. The Lower Court's Decision Will Seriously Impair the Regulatory Plan and Provision of Telephone Service at Affordable Rates.

This Court has given weight, in granting certiorari, to the practical effect of the lower court decision.[46] In this case, the adverse consequences of that decision are severe and ramifying. It undermines the FCC's entire regime of grants to limited service carriers, seriously disrupts administrative and judicial proceedings, and threatens the provision of affordable long distance and local telephone service.

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[45] In that case, this Court held that a lower court, invalidating a condition in a license, usurped the administrative function when it sought to affirm the license on an unconditioned basis. Instead, the Court held that the lower court could only affirm or vacate the license as conditioned and, if the condition were struck down, then the agency was entitled to decide anew whether to grant the license in unconditioned form. The basic principle is well established. See, *e.g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965).

[46] *E.g.*, *Patterson* v. *Lamb*, 329 U.S. 539, 541 (1947); *Permian Basin Area Rate Cases*, 390 U.S. 747, 755 (1968); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302 n.2 (1947).

First. The lower court's reading of the Act demolishes the FCC's regulatory structure under which many types of limited service carriers have been authorized to supplement the basic switched public message services offered by the telephone companies. Over the last forty years, the Commission has created numerous classes of limited service carriers.[45] Thousands of Section 214 certificates and Section 309 radio licenses have been granted to implement service in these categories. Lacking the type of "affirmative determinations" called for by the lower court, the careful allocation of functions among carriers now appears to be totally frustrated.[46]

Quite apart from impairing numerous carrier classifications and thousands of individual authorizations already granted, the lower court's decision will cause havoc in future licensing proceedings. Henceforth, every time a certifying agency like the FCC proposes to make a limited service grant, it will have to make and support "affirmative determinations" that it would be contrary to the public interest for the limited service carrier to provide services which it has never sought

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[45] These include CATV relay carriers, television transmission carriers, carriers providing multipoint distribution service, offshore radio carriers, specialized carriers, domsat carriers, international record carriers, value-added carriers, carriers to provide rural radio service, carriers providing mobile telephone service, and carriers to provide news transmission service.

[46] This appears to be equally true for other licensing agencies. For example, the numerous ICC motor carriers certified to haul only specific commodities (*e.g., Michigan & Nebraska Transit Co., Inc.*, 119 M.C.C. 846 (1972); *Consolidated Carriers Corp., supra*) are now presumptively free to carry any products they choose; rarely, if ever, will there have been an "affirmative determination" in the certifying decision that it would disserve the public interest for the carrier to carry items for which it never sought authority.

to provide. This means that every proceeding for a limited service grant, for which no opposition might otherwise exist, will be transformed into an open-ended inquiry into whether a new unlimited service carrier should be authorized for the particular route. The multiplication of issues, the unnecessary litigation, and the attendant delay are manifest.

These consequences—both for past classifications and for future grants—will occur whatever the FCC may do about specialized carriers in any subsequent proceeding under the lower court's decision. The lower court's interpretation of the statute is obviously not limited to Execunet; any FCC decision to authorize a limited service carrier or class of carriers is now subject to the same requirement. Thus, whatever limitations the FCC might ultimately impose on specialized carriers in subsequent proceedings, all other past carrier classifications remain invalid and all other future grant proceedings will be seriously warped and prolonged.

Second. The lower court's decision will immediately cause administrative and judicial disruption on a grand scale, regardless of anything the FCC may ultimately do about restricting specialized carriers in a future proceeding. The FCC has made numerous grants to authorize specialized carrier service on the premise that the carriers were restricted to private line service; and two courts have been induced to affirm major FCC rulemaking proceedings concerning specialized carriers on that assumption. See p. 8, above. If the lower court's decision is allowed to overturn that assumption, then all of these past grants and judicial affirmances have been based on a fundamental mis-

understanding and on incorrect representations, and all of them are subject to being reopened and voided.[47]

The premise that specialized carriers were validly limited to providing private line service has also been relied upon in other types of cases. It has been utilized, for example, to create a parallel class of domestic satellite carriers to provide private line service (see p. 8, above); and it has been a basic assumption in a major FCC proceeding requiring existing carriers to change their practices regarding the resale and shared use of their services.[48] These are merely examples of structural changes and decisions that will have to be reexamined and untangled if the lower court's decision becomes final.

In sum, a great part of what the FCC has done for almost a decade in the field of common carrier regulation has been based on the proposition nullified by the lower court in this case. Decisions in appellate proceedings concerning these regulatory steps have occurred or are occurring in a number of different circuits.[49] To

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[47] It is well settled that the courts can recall their mandates and vacate prior decisions to prevent fraud or injustice and to protect the integrity of judicial processes. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944); *Perkins* v. *Standard Oil Company*, 487 F.2d 672 (9th Cir. 1973); *Gradsky* v. *United States*, 376 F.2d 993 (5th Cir. 1967).

[48] See *Resale and Shared Use of Common Services*, 60 F.C.C.2d 261 (1976), *recon. denied*, 62 F.C.C.2d 588 (1977), *appeal pending sub. nom. AT&T* v. *FCC*, 2d Cir., Nos. 77-4057, *et al.*

[49] Past and pending cases which involve the premise include *United States* v. *FCC*, D.C. Cir., Nos. 77-1249, *et al.* (grant for joint venture of IBM and others); *Bell Telephone Co. of Pennsylvania* v. *FCC*, *supra* (3rd Cir.); *AT&T* v. *FCC*, 2d Cir., Nos. 77-4057, *et al.* (resale and sharing); *AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976) (grant to ITT subsidiary); *Washington Utils. & Transp.*

alter this premise on the basis of a single lower court decision is, *mutatis mutandis,* as if the District of Columbia Circuit were permitted to void the Commerce Clause, without regard to years of congressional legislation and of judicial decisions depending directly upon its validity. Such an upheaval ought not to be permitted until this Court has reviewed the decision.

Third. The lower court's decision will have a severe adverse impact on affordable telephone service in the United States. If the lower court's decision stands, the telephone companies will be threatened with a massive diversion of MTS traffic from the switched network.[50] This diversion can occur at an extraordinary rate—literally in a matter of months—because the specialized carriers have thousands of intercity circuits in operation and they utilize existing local distribution facilities already in place. Past experience confirms the severity and speed of this threat.[51]

Comm'n v. *FCC, supra* (9th Cir.); *MCI* v. *FCC* and *Southern Pacific Communications Corp.* v. *FCC*, D.C. Cir., Nos. 76-2071, *et al.* ("Sprint" and "SPLS" services).

[50] This does not result from any inherent advantage of specialized carriers, which use the same microwave technology long utilized by the existing carriers. The rates charged by existing carriers on major routes are based on nationwide averaged costs to reflect the need to assure affordable service to customers in low density and rural areas; such rates are also designed to make a contribution toward affordable local telephone rates. See p. 4, n.7, above. Specialized carriers assume no responsibility for nationwide service and make no such contribution so it is easy for them to underprice the telephone companies on major routes.

[51] In the period 1975-76, MCI expanded its Execunet revenues over 70 times, based on its own figures. Roberts affidavit, July 1975, para. 7, filed in the court below; McGowan letter, Aug. 1976, filed in the court below. In the same period, it expanded the number of customers from a handful to "approximately 10,000." McGowan aff., Sept. 1976, para. 8, filed in the court below.

The sudden massive diversion of traffic from the existing MTS network would have very serious effects on the public. The consequence would include a massive loss of MTS revenues and the need for corresponding increases in telephone rates,[52] a reduction of traffic needed to justify the use of high capacity transmission systems presently used to reduce unit costs and long distance rates throughout the system, a loss in the "separations" revenue now used to hold down rates for local exchange services,[53] and the destruction of nationwide rate averaging used to provide affordable long distance rates in low density and rural areas. Ultimately, the victim of these consequences will be the ordinary telephone user, and Congress' policy of universal telephone service at affordable rates will be jeopardized. Section 1 of the Act, 47 U.S.C. § 151.

It is no answer to say that the FCC may conduct further proceedings and reimpose on specialized carriers the limitations which everyone has heretofore assumed to exist. Under the lower court's decision, specialized carriers have every incentive to prolong any such proceeding; whatever the Commission decided would be followed by stay applications to the

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[52] AT&T estimated that $80 million annually in MTS revenues is jeopardized by Execunet circuits in place in July 1976 in only 15 MCI cities. Muench aff., Aug. 1976, para. 12, filed in the court below. If Execunet-type service were allowed to expand without limitation and were extended by MCI and other such carriers to the over 150 cities currently served by specialized and domsat carriers, the traffic diversion and revenue loss could quickly become enormous.

[53] This separations revenue is extremely important in maintaining affordable local telephone service. Approximately 32 percent of all MTS revenue goes to support facilities used primarily for local exchange service.

District of Columbia Circuit and judicial review. See Pet. App. 30a-31a. Years could pass before the FCC's restriction was made effective, even assuming the inquiry itself was not hopelessly prejudiced in the delay.[54]

The Communications Act requires that the impact of new competition would be appraised before, and not after, it is authorized and implemented. See *FCC* v. *RCA Communications, Inc., supra.* Yet if the lower court's decision stands, the entire field of long distance telephone service—where regulation has provided the United States with "the finest telephone system in the world" (President's Task Force on Communications Policy, *Final Report,* ch. 6, p. 5 (1968))—will be opened to full scale competition without any prior determination of the public interest impact of such competition. The lower court's decision directly frustrates both the Act and this Court's *RCA* decision.

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[54] Quite apart from the multimillion dollar losses inflicted in the meantime, this very delay could serve to expand and entrench existing Execunet-type services to the point where effective ultimate FCC relief would probably be impossible. As the FCC explained in relation to CATV, "Once entrenched it is difficult, if not wholly impracticable in light of the disruption which would result, to take effective action or to attempt to roll back the situation . . . ." *Second Report and Order on CATV,* 2 F.C.C.2d 725, 782 (1966), *aff'd sub nom. Black Hills Video Corp.* v. *FCC,* 399 F.2d 65 (8th Cir. 1968).

CONCLUSION

For the reasons stated, certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

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TABLE OF CONTENTS

Appendix A

Page

Opinion of the United States Court of Appeals for the District of Columbia Circuit, July 28, 1977 .... 1a

Appendix B

Decision of the Federal Communications Commission, adopted June 30, 1976; released July 13, 1976 ... 1b

Appendix C

Pertinent Provisions of the Communications Act of 1934 ..... 1c

Appendix D

Excerpts from Briefs and Decisions Respecting the *Specialized Carrier* Decision 1d

Appendix E

Charts Illustrating Execunet and MTS 1e

Appendix F

Applications and Grants of MCI and Associated Carriers 1f

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1635

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents*

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, DATA TRANSMISSION COMPANY (DATRAN), AND SOUTHERN PACIFIC COMMUNICATIONS COMPANY, *Intervenors*

Petition for Review of Orders of the Federal Communications Commission

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Argued April 28, 1977

Decided July 28, 1977

Kenneth A. Cox, with whom *Michael H. Bader*, *William J. Byrnes*, and *Raymond C. Fay* were on the brief, for petitioners.

John E. Ingle, Counsel, Federal Communications Commission, with whom *Werner K. Hartenberger*, General Counsel, and *Daniel M. Armstrong*, Associate General

Counsel, Federal Communications Commission, and *Carl D. Lawson,* Attorney, Department of Justice, were on the brief, for respondents. *Ashton R. Hardy,* General Counsel for the Federal Communications Commission at the time the record was filed, entered an appearance for respondent Federal Communications Commission. *James F. Ponsoldt,* Attorney, Department of Justice, entered an appearance for respondent United States of America.

Michael Boudin, with whom *Craig D. Miller, Alfred C. Partoll,* and *F. Mark Garlinghouse* were on the brief, for intervenor American Telephone and Telegraph Company.

Thomas J. O'Reilly was on the brief for intervenor United States Independent Telephone Association.

John M. Scorce and *Kevin H. Cassidy* were on the brief for intervenor Data Transmission Company.

Herbert E. Forrest entered an appearance for intervenor Southern Pacific Communications Company.

Before WRIGHT, TAMM, and WILKEY, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge:* This is a petition to review two orders of the Federal Communications Commission, each of which requires petitioner MCI Telecommunications Corporation to cease and desist from offering and operating its "Execunet" telephone service.[1] Finding that the Commission has not taken the steps required by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1970), to restrict the services MCI may offer over its *existing* facilities, we reverse.

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[1] The orders are a letter order of July 2, 1975 (FCC 75-799) and the *Decision* in *MCI Telecommunications Corp.*, 60 FCC2d 25 (July 13, 1976). The letter order is set out at Appendix B of the second order, 60 FCC2d at 62-64.

I. Background

MCI Telecommunications Corporation, Microwave Communications, Inc., and N-Triple-C Inc. (hereinafter, collectively, MCI) are affiliated communications common carriers which operate a transcontinental point-to-point microwave system catering to business and data communications markets. In the vernacular of the trade MCI is a "specialized common carrier."

The present dispute has its roots in MCI's September 1974 filing of revisions to its tariffs F.C.C. No. 1—the tariff under which MCI furnishes all its interstate services. Those revisions, which became effective October 10, 1974, established rates for a class of "metered use" services, among which was Execunet.[2] With Execunet a subscriber using any push-button telephone (or rotary dial phone and tone generator) can reach any telephone in a distant city served by MCI simply by dialing a local MCI number followed by an access code and the number in the distant city. Execunet customers are billed for each call on a time and distance basis, subject to a monthly minimum.[3]

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[2] Apparently the tariffs do not themselves define Execunet service, but define only certain "modular" services and rates therefor. Putting these modular services together in a particular way results in the Execunet service package. The term "metered use" refers to the fact that charges for some services are set on a usage basis.

[3] Execunet's characteristics are summarized as follows:

A customer in the calling city calls the local MCI office via local exchange telephone service from any push-button telephone in the local exchange area. A rotary-dial telephone can also be used if the caller has a touch-tone pad (tone generator). This device can be purchased in the open market from numerous sources. He then pulses his customer code and the area code and calling number of any telephone in one of a number of distant cities. Connection at the distant end may again be accomplished via the local exchange telephone service in that area. Upon connection, the customer is charged a per-minute

In the spring of 1975 intervenor AT&T, after subscribing to Execunet and procuring Execunet marketing brochures, complained orally to the Commission that MCI was offering interstate long distance message telephone service (MTS) under the guise of Execunet and that no such service could properly be tariffed by MCI. Apparently AT&T representatives approached individual commissioners and various Commission staff personnel with this complaint and even held a demonstration of Execunet in the Commission's offices. Subsequent to the *ex parte* complaints, AT&T filed with the Commission a letter which repeated the allegations previously made.

The Commission forwarded AT&T's letter to MCI and indicated that MCI's "comments on this matter would be appreciated."[4] MCI wrote a series of letters in return. In the first it took the position that AT&T's complaint was untimely and should be rejected, but that in any case Execunet was a "private line" service which MCI was authorized to offer.[5] By a further letter MCI complained of AT&T's *ex parte* "lobbying" and asked for an opportunity to present its side of the dispute to the Com-

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toll, based upon the mileage to the city called, subject to a connection charge and a monthly minimum charge. Any MCI Execunet customer in the calling city can access the system at any time to place a call, and presumably many such customers may utilize the intercity facilities simultaneously. In other words, none of the MCI plant, or indeed any of the plant used in completing the call, is dedicated to the use of a particular customer during any specified time; rather it is available upon demand.

MCI Telecommunications Corp., supra note 1, 60 FCC2d at 26 n.1.

[4] Letter from FCC to MCI, May 1, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 64, JA 8.

[5] Letter from MCI to FCC, June 5, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 65-68, JA 9-15.

mission.[6] In a third letter MCI pointed out that its licenses were not limited by anything in Section 21.705 of the Commission's rules [7] pursuant to which point-to-point microwave radio licenses are issued to communications common carriers.[8] It also called the Commission's attention to AT&T's comments in Rulemaking Docket 19117,[9] in which AT&T had taken the position that the Commission had no statutory authority to require prior approval of new services that were to be offered over existing facilities of a domestic carrier, but instead could regulate such services, if at all, only under the tariff provisions of the Communications Act. In MCI's view, AT&T's position in Docket 19117 [10] denies the authority asserted by the Commission in the instant proceeding on AT&T's behalf. MCI also pointed out that the report in Docket 19117 states that new service offerings could be proposed by merely filing a tariff.[11]

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[6] Letter from MCI to FCC, June 9, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 69-70, JA 16-18.

[7] § 21.705 Permissible communications.

Stations in this service are authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization or limited by § 21.701 or § 21.703 [the latter rules relating to frequency use]. • • •

47 C.F.R. § 21.705 (1976).

[8] Letter from MCI to FCC, July 1, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 80-84, JA 39-48.

[9] *In the Matter of Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities, and Amendment of Part 63.60—63.90 of the Rules, Notice of Proposed Rule Making*, 27 FCC2d 36 (1971); *Report and Order*, 39 FCC2d 131 (1973).

[10] *See Letter, supra* note 8, 60 FCC2d at 82-83, JA 44-46.

[11] "[T]he termination of the rule making proposed herein will

Without holding a hearing or even disclosing the details of AT&T's arguments concerning the unlawfulness of Execunet, the Commission on July 2, 1975 wrote a letter to MCI which stated: "[Y]our tariff F.C.C. No. 1 is hereby rejected insofar as it purports to offer Execunet service, but without prejudice to MCI's offering any other service which you are authorized to provide." [12] The rationale for this order was explained in the body of the letter.

First, the Commission concluded that MCI could offer only "private line" communications services over its existing facilities:

> In the various Commission orders granting the Section 214 applications of the MCI carriers to construct and operate facilities (e.g., 32 F.C.C.2d 36 (1971), FCC 72-456 (May 26, 1972), FCC 72-832 (September 22, 1972), FCC 72-852 (September 29, 1972)), appears language similar to the following:
>
> > The service proposed is essentially private line for the transmission of data, facsimile, control, remote metering, voice and other communications.
>
> Each grant refers to the paragraph which incorporates the above language as conditioning the grant of construction and operating authority. As a result, MCI is only permitted to operate its facilities for private line services.

Further, in our *Second Report* on domestic satellites, which followed the *Specialized Common Carrier*

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make it possible for domestic carriers, as a general rule, to offer new classes or subclasses of communications service over duly authorized facilities merely by the filing of appropriate tariff revisions • • •." *Report and Order, supra* note 9, 39 FCC2d at 135.

[12] *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 64.

decision, we pointed out (35 F.C.C.2d 844, 853 (1972)):

> In encouraging multiple entry and the development of competition in the supply of domestic communications, we have maintained a distinction between the so-called monopoly switched telephone services now being furnished by AT&T and all other classes of existing and potential specialized services.

It is thus clear that MCI sought authorization to offer only private line services, and that it was granted authority to offer only such services.[13]

The Commission then rejected MCI's arguments that Execunet was a private line service like AT&T's foreign exchange" (FX) service, deciding instead that "the combination of * * * similarities" between Execunet and AT&T's MTS made Execunet "essentially a switched public message telephone service * * *."[14]

MCI immediately filed a petition for review in this court and sought a stay of the Commission's order, arguing that the Commission had failed to comply with Section 4 of the Administrative Procedure Act,[15] its own rules governing informal complaints,[16] its own rules governing *ex parte* contacts,[17] Sections 204 and 205 of the Communications Act, 47 U.S.C. §§ 204-205 (1970), and the Due Process clause. The request for a stay was

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[13] *Id.* at 63.

[14] *Id.*

[15] 5 U.S.C. § 553 (1970).

[16] 47 C.F.R. §§ 1.711-1.735 (1976).

[17] 47 C.F.R. §§ 1.1201-1.1251 (1976). *See also Rules Governing Ex Parte Communications*, 1 FCC2d 49 (1965).

granted.[18] Subsequently the Commission, which had previously refused to allow MCI any kind of hearing, moved to have the proceedings remanded so that it could consider matters more fully than it had previously. This motion was granted, although jurisdiction was retained.

In December 1975 the Commission issued an order commencing the proceedings on remand. *MCI Telecommunications Corp.*, 57 FCC2d 271 (1975), SA 49.[19] It announced that comments and reply comments would be accepted and that oral argument or an evidentiary hearing might be held if warranted by the written submissions. The issue to be resolved was said to be "whether or not Execunet is a service which MCI is authorized to offer pursuant to its facility authorizations and policies set forth by this Commission."[20] On March 26, 1976 the Commission announced that it would hold oral argument and designated the issues to be addressed at that time. The issues the Commission identified as having been raised by the comments and reply comments were the following:

a. What class or classes of service is MCI permitted to offer pursuant to its facility authorizations and Commission policies?

b. What changes, if any were made to the permitted classes of service by our Report and Order in Docket 19117, 39 FCC2d 131 (1973)?

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[18] This court initially stayed the Commission's order in its entirety. After the proceedings on remand our order was modified to allow MCI to continue to serve its present customers, but solicitation of new customers was not permitted.

[19] "SA" refers to a two-volume Supplemental Appendix covering the proceedings on remand.

[20] *MCI Telecommunications Corp.*, 57 FCC2d 271, 271-272 (1975), SA 49-50.

c. Is Execunet service, as presently offered, a private line service?

d. Were any communications between parties to this proceeding and the Commission, as developed by filings herein, in violation of any applicable statute or regulation?

e. If any prohibited contacts occurred, what effect have they had on the substance of this proceeding?

f. Whether any further proceedings are required to comport with the requirements of due process of law.

MCI Telecommunications Corp., 58 FCC2d 962, 963 (1976), SA 812.

Prior to oral argument the Commission issued yet a third order responding to procedural motions made by MCI at various points during the comment period. *MCI Telecommunications Corp.*, —— FCC2d —— (FCC 76-441, May 17, 1976), SA 892. In this order the Commission rephased the primary issue before it as "whether MCI's facility authorizations and Commission policies restrict in any way the broad categories of service which MCI may offer."[21] It also stated that the proceedings would not be expanded to include consideration of "whether it is in the public interest for MCI to offer Execunet regardless of whether it is within the class of services it may offer."[22] Finally, the Commission for the first time mentioned the statutory authority for its actions: "th[is] proceeding is an investigation into the lawfulness of MCI's Execunet service offering, conducted

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[21] *MCI Telecommunications Corp.*, —— FCC2d —— (FCC 76-442, May 17, 1976), SA 894.

[22] *Id.*, SA 895.

pursuant to Sections 4(i), 4(j), 201, 204, 205, 208 and 403 of the Communications Act of 1934, as amended, 47 USC 154(i), 154(j), 201, 204, 205, 208 and 403."[23]

After oral argument the Commission issued an extensive opinion, again finding that MCI was not authorized to offer Execunet. *MCI Telecommunications Corp.*, 60 FCC2d 25 (1976). The approach taken in that opinion is materially different from that taken in the July 1975 letter order, however. Whereas the letter order had relied on express restrictions written into MCI's facilities authorizations (the certificates of public convenience and necessity issued pursuant to Section 214(a) of the Communications Act, 47 U.S.C. § 214(a) (1970)),[24] the opinion on remand stated:

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[23] *Id.*

[24] (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line • • •. • • • No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby • • •. As used in this section the term "line" means of channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

> As MCI points out, however, not all of its authorizations contain similar language [*i.e.*, restrictions], some contain no such restrictions, and thus it is necessary to look further, to our expressed policies and to judicial statements, to ascertain the limits on [specialized common carrier] services.[25]

The Commission's "further look" began with a review of the seminal *Specialized Common Carrier* decision,[26] pursuant to which most specialized carrier facilities authorizations have been issued. The purpose of that decision was to facilitate the Commission's handling of Section 214 applications by determining by rulemaking "[w]hether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field * * *."[27] While the Commission apparently concedes that it did not define the boundaries of the "specialized communications field,"[28] it asserts that the services to be offered over the facilities covered in some 1,700 Section 214 applications before it provided a touchstone for its analysis and that all such services were "private line." Accordingly, it is the Commission's position that it did not consider services other than private line services in determining the public interest ramifications of competition.[29] As an example

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[25] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 35.

[26] *Specialized Common Carrier Services*, 29 FCC2d 870 (1971), *aff'd, sub nom. Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). *See also Bell Telephone Co. v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *AT&T v. FCC* [*United States Transmissions Systems, Inc.*], 539 F.2d 767 (D.C. Cir. 1976).

[27] *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 878.

[28] *See* note 68 *infra*.

[29] 35. At the time of the *Specialized Common Carrier* decision, we had before us 1712 microwave applications from 33

of this the Commission points to its analysis of "cream-skimming," the argument that specialized carriers will upset the established rates of general carriers (such as AT&T) by siphoning off high-profit business.[30] The Commission's interpretation here of its discussion of cream-skimming in *Specialized Carriers* is that it found allegations of cream-skimming to be unfounded only because the specialized carriers were not proposing to compete "to any substantial degree" with AT&T's monopoly service offerings, MTS and WATS.[31]

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applicants, 17 of which were affiliated with MCI. Accordingly, the statements of MCI as to the types of services it proposed to offer were of importance in the policy determination made therein and are helpful in ascertaining the limits, if any, imposed upon Specialized Common Carrier (SCC) service offerings. The MCI applications considered were for "portions of a proposed nationwide network to provide specialized *private line* communications services" (emphasis added) 29 FCC2d at 874. We further quoted MCI's pleadings that "the real distinction which delineates MCI service from anything provided today by existing common carriers is not the facility itself but the manner in which a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability" 29 FCC2d at 875. Finally MCI asserted that there was a distinct difference between a public telephone service which is a natural monopoly and a customized communications service offered on a private line basis, *Id.* [*sic*] Thus, MCI sought herein to offer only private line, point-to-point services. • • •

MCI Telecommunications Corp., supra note 1, 60 FCC2d at 36. *See also* FCC Letter Order, *id.*, Appendix B, 60 FCC2d at 62:

Specialized Common Carrier Services, 29 F.C.C. 2d 870 (1971), which established the Commission's policies regarding entry of the specialized common carriers in competition with AT&T, contemplated such entry only in the private line field, not in the area of switched public message telecommunications service. • • •

[30] *See Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 910 (¶ 78).

[31] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at

Having concluded that the *Specilized Common Carrier* decision makes no reference to competition in other than private line areas, the Commission turned next to MCI's allegations concerning the meaning of the Commission's Rule 21.705, 47 C.F.R. § 21.705 (1976), and its orders in Docket 19117.

Rule 21.705 governs the scope of licenses granted carriers in the point-to-point microwave service. Its operative language is that a carrier may offer any service "provided for in the *legally applicable tariffs* of the carrier, unless otherwise directed in the applicable instrument of authorization * * *" (emphasis added). MCI, focusing on the second phase, had argued that the absence of any directions in its instruments of authorization indicated that it was free to offer by tariff *any* communications service that could physically be provided on its existing system. The Commission, on the other hand, took the position that the italicized language is the key and that tariffs exceeding the bounds of the *Specialized Carrier* decision can never become "legally applicable." Thus in the Commission's view Rule 21.705 merely "expresses the truism that a carrier need not generally file an application [under Section 214] for each new service it wishes to offer, [and therefore] it cannot be used to reverse a clearly defined Commission policy." [32]

The Commission takes a similarly narrow view of the effect of its *Report and Order* in Docket 19117. That docket was started to consider whether domestic carriers should be required to get Commission approval before filing tariffs proposing services not previously provided or set out in a Section 214 application.[33] The purpose

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36, quoting *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 915.

[32] *Id.* at 38.

[33] *See Notice of Proposed Rule Making, supra* note 9, 27 FCC2d at 38-39.

of the proposed rules was threefold: to decide the public interest ramifications of a service before it was commenced, thereby protecting the public from service disruptions that might be caused if the service were allowed to go into effect and later enjoined; to put general domestic carriers (such as AT&T and Western Union), which could theretofore start a new service simply by filing a tariff, on an equal footing with international and domestic miscellaneous carriers whose facilities authorizations were always restricted so that new services required further Section 214(a) proceedings; and to protect entrants to the specialized carrier field who also needed prior approval of entry under Section 214(a) from unfair competition from the generalized carriers.[34] The proposed rules were never adopted, and restrictions in facilities authorizations which had worked a result similar to the proposed rules were expressly declared "null and void" in the order terminating the docket.[35]

MCI argued before the Commission that the result of Docket 19117 was that any express restrictions in its facilities authorizations were lifted and that it should be free as a result of the order terminating the docket to propose new services simply by filing a tariff, even if it was not free before. The Commission's response was that Docket 19117 was not concerned with competition except in the specialized carrier field—the only field in which competition was allowed at the time of the *Report and Order* in that docket.[36] Thus the Commission's view apparently is that existing specialized carriers are allowed to offer private line services free of any prior approval requirement as a result of Docket 19117, but are required to proceed by Section 214 application with respect to all other services.

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[34] *Id.* at 39.

[35] *See Report and Order, supra* note 9, 39 FCC2d at 137.

[36] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 39.

In the remainder of the opinion below the Commission again concluded that Execunet was not a private line service.[37] It also concluded that no facts were in dispute which required an evidentiary hearing and denied MCIs motion for one.[38] The Commission for a second time refused to consider whether Execunet should be permitted regardless of the scope of the *Specialized Common Carrier* decision, and further indicated that it had intended to confer on AT&T a monopoly over MTS and WATS by its ruling in *Specialized Carriers*, a decision that could not be changed absent a demonstration of changed circumstances.[39] Finally, the Commission refused to inquire further into the *ex parte* contact problem on the ground that all such contacts had occurred before commencement of formal proceedings and were, therefore, proper under both court and Commission rulings.[40]

On this petition for review MCI has challenged virtually every ruling of the Commission in the proceeding on remand and has renewed its attack on the July 1975 letter order.

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[37] *See id.* at 40-44.

[38] *Id.* at 44-48.

[39] [W]e disagree with MCI that we have never defined the areas of telecommunications service which should be open to competition and those which are a monopoly. Rather, that was the principal purpose of our investigation in [*Specialized Carrier Services, supra* note 26]. • • •

• • • •

109. In essence MCI is • • • asking us to reopen the *Specialized Common Carrier* decision to determine again what services should be open to competition. We decline to do so. • • • There is no allegation that the public interest considerations upon which the *Specialized Common Carrier* [was] based have changed at all • • •.

MCI Telecommunications Corp., supra note 1, 60 FCC2d at 56-57.

[40] *Id.* at 48-54.

II. Analysis

A.

The implicit restrictions argument advanced by the Commission in its opinion on remand represents a substatial departure from prior administrative practice. As the Commission's letter order suggests, the usual way in which a carrier becomes restricted in the services it may offer is for the Commission to write restrictions into the facilities authorizations that must be obtained pursuant to Section 214 of the Communications Act before any communications line may be built, operated, or extended.[41] Accordingly, a carrier can usually tell if it is subject to service restrictions simply by examining the instruments of authorization issued to it by the Commission. Section 21.705 of the Commission's rules, 47 C.F.R. § 21.705 (1976), which governs the manner in which point-to-point microwave radio licenses can be used by specialized carriers such as MCI, similarly recognizes that the usual place to find restrictions on services is in the "applicable intrument of authorization." *See also* 47 U.S.C. § 309(h)(1) (1970) (which indicates that restrictions will usually be found in the license instrument); 47 C.F.R. § 21.903(b) (1976) (instrument of authorization controls in part services that may be offered on a multi-point distribution system).

The Commission's discussion of its administrative practice in Docket 19117 is also instructive. There the Commission explained that in the absence of restrictions imposed under Section 214 in the facilities authorizations, carriers could offer any service which could physically be provided over their existing systems simply by filing a tariff.[42] This discussion clearly indicates that the Commis-

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[41] *See* text at note 13 *supra*; note 24 *supra*.

[42] *See Notice of Proposed Rule Making, supra* note 9, 27 FCC2d at 38; *Report and Order, supra* note 9, 39 FCC2d at 133.

sion's understanding of Section 214 of the Act has until now been that explicit action is necessary to restrict a carrier to the service offerings it proposed when it sought authority to build, operate, or extend its communications lines.

Finally, as evidenced by the decision in *Press Wireless, Inc.*, 25 FCC 1466 (1958), *aff'd, sub nom. Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) (*per curiam*), the Commission has from time to time exercised its express authority under Section 303(b) of the Act, 47 U.S.C. § 303(b) (1970), to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class" by promulgating rules setting out limitations on services to be offered over radio facilities. *See, e.g.*, 47 C.F.R. §§ 21.509, 21.606, 21.903 (1976). In this regard it is instructive to note that the Commission has *not* enacted any comparable service restrictions for point-to-point microwave licensees and in particular it has *not* made the definition of "private line service" set out in 47 C.F.R. § 21.2 (1976) applicable to such licenses, although this would certainly seem to be the natural thing to have done had the Commission sought to restrict specialized carriers to private line service offerings.

The fact that an administrative practice is novel does not, of course, mean that it is wrong. However, novelty is a warning signal that all may not be well, especially in the instant case in which the Commission has itself failed to discuss the statutory warrant for the new course it has adopted. When the Communications Act is considered in detail, it becomes apparent that novelty has led to error in this case.

B.

To frame our analysis, we sketch at the outset some principles which are either uncontested or uncontestable.

First, it is settled that "a tariff [may] be rejected if it is unlawful without prior agency approval and approval has not been obtained." *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971); *accord, Press Wireless, Inc. v. FCC, supra.*[43] Yet the power to require prior agency approval is itself circumscribed, for it is well recognized that the tariff provisions of the Communications Act (Sections 203-205, 47 U.S.C. §§ 203-205),[44] like the cognate sections of the Interstate Com-

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[43] *See also North Central Truck Lines, Inc. v. ICC*, —— F.2d ——, —— (D.C. Cir. No. 76-1597 decided June 6, 1977) (slip op. at 4); *Delta Airlines, Inc. v. CAB*, 543 F.2d 247, 254 (D.C. Cir. 1976); *Municipal Light Boards of Reading & Wakefield, Mass. v. FPC*, 450 F.2d 1341, 1345-1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

MCI has vigorously argued that rejection of a tariff is not possible once a tariff has become effective. We need not decide whether this is so since, as this case comes to us after remand, no facts material to the issues thus far decided by the Commission are in dispute and, accordingly, the Commission could, as it apparently did, issue a cease and desist order pursuant to 47 U.S.C. § 205 (1970) without more of a hearing than has already been afforded MCI. Thus, even if the Commission was without power to reject a tariff as that phrase is used as a term of art, it was empowered to reject the Execunet tariff in a practical sense.

[44] Under the Communications Act the practices of *existing* carriers using *existing* facilities are regulated primarily through the tariff mechanism established in §§ 203-205 of the Act, 47 U.S.C. §§ 203-205 (1970). Section 203 obliges carriers to file tariff schedules with the Commission and to make such schedules available to the public. Section 203(b) expressly recognizes that changes in the services a carrier may offer will be commenced with a tariff filing. Operation except in strict compliance with applicable tariffs is prohibited, 47 U.S.C. § 203(c), as are discriminations and preferences, *id.* § 202. Prior to the effective date of a tariff—a date certain that must be set out in the tariff, *id.* § 203(d)—the Commission may suspend the tariff and hold a hearing concerning the lawfuless thereof. *Id.* § 204. If the hearing has not been completed within three months (five months as of 1976, *see* 47 U.S.C.A. § 204 (1977 pocket part)) after the effective date of the suspended tariff,

merce Act (49 U.S.C. §§ 15(1), 15(7) (1970)),[45] embody a considered legislative judgment that carriers should in general be free to initiate and *implement* new rates or services over existing communications lines unless and until the Commission, after hearing, determines that such rates or practices are unlawful, subject only to a limited period of suspension set out in the statute. *AT&T v. FCC*, 487 F.2d 865, 870-881 (2d Cir. 1973); *see United States v. SCRAP*, 412 U.S. 669, 697 (1973) (interpreting Interstate Commerce Act); *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 662-669 (1963) (same).[46]

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that tariff by law goes into effect. *Id.* After the effective date, and without regard to whether a tariff has previously been suspended, the Commission may hold a hearing on the lawfulness of the tariff, although the tariff must be allowed to remain in effect pending the outcome of such a hearing. *Id.* § 205; *see AT&T v. FCC*, 487 F.2d 865, 874-875 (2d Cir. 1973). Subsequent to a hearing under either § 204 or § 205 the Commission may prescribe such rates, classifications, regulations, or practices as shall be determined to be just, fair, and reasonable, and it may enjoin the carrier from continuing services except as prescribed. 47 U.S.C. §§ 204, 205.

[45] "Section 204 * * * is adapted from section 15(7) of the Interstate Commerce Act so as to apply to communications. * * * Section 205 follows sections 15(1) and 16(8) of the Interstate Commerce Act * * *." S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934). *See also* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 5-6 (1934).

[46] Since the most likely objection to MCI's provision of Execunet service is its potential effect on AT&T's MTS, it is useful to note that the Supreme Court, in *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 669 (1963), rejected the claim that a court should have the power to extend the statutory suspension period to protect competitors of a carrier and their customers:

> It must be admitted that Congress dealt with the problem as it affected the relations between shippers and carriers, making no express reference to the interests of competing carriers and their customers such as are involved this case. We see no warrant in that omission, however, for a difference in result. * * *

In noting that neither claims of a carrier's customers nor those

As the Second Circuit explained in the *AT&T* case in overturning a Commission requirement that AT&T obtain approval prior to filing tariff revisions:

> In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.[47]

The Second Circuit, moreover, rejected the Commission's argument that the general grants of procedural authority in Sections 4(i), 4(j), and 403 of the Act, 47 U.S.C. §§ 154(i), 154(j), 403 (1970), empowered the Commission to erect prior approval requirements like that imposed on AT&T, although it recognized that the Commission would have the power to reject a tariff whenever a section of the Act expressly establishes or authorizes [48] a prior approval requirement.[49]

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of its competitors' customers in any way abridge the right of a carrier to implement a new rate or service, we do not intend to suggest that a showing of harm to competitors or competitors' customers would be insufficient to sustain a service restriction promulgated in accord with 47 U.S.C. § 214(c) (1970) or 47 U.S.C. §303 (b) (1970). Our only point is that allegations of harm to competitors or competitors' customers do not in any way expand the Commission's suspension or rejection powers.

[47] *AT&T v. FCC, supra* note 44, 487 F.2d at 880 (footnote omitted).

[48] Of course, if the statue merely authorizes the Commission to impose a prior approal requirement, as is the case with § 303(b), 47 U.S.C. § 303(t) (1970), that authority would have to be exercised before rejection is proper.

[49] *AT&T v. FCC, supra* note 44, 487 F.2d 876-881 & 880 n.13, citing *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

Applying these principles to the instant case, the issues to be resolved are two: whether and to what extent Section 214 of the Communications Act expressly authorizes the Commission to impose prior approval requirements through the facilities authorization mechanism, and whether the Commission has properly excerised whatever authority it may have under Section 214.

Section 214 establishes the Commission's regulatory charter over entry into the common carrier communications field and states that no carrier shall construct, extend, or acquire a line unless the Commission has first affirmatively determined that such entry would be in the public interest.[50] The primary purpose of Section 214 (a) is prevention of unnecessary duplication of *facilities*, not regulation of services.[51] Because of this, Section 214 would appear to have a limited office with respect to regulation of service offering on existing lines. We have held as much,[52] and this view is confirmed by the final proviso to Section 214(a) which states expressly that

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[50] *See* note 24 *supra*.

[51] *See* 78 CONG. REC. 10314 (1934) ("The section [§ 214] is designed to prevent useless duplication of facilities, with consequent higher charges upon the users of services."). It is also clear that § 214 was intended to apply only to construction or acquisition of new lines. *See id.;* H.R. Rep. No. 1850, *supra* note 45, at 6; S. Rep. No. 781, *supra* note 45, at 5; accord, *Western Union Telegraph Co. v. FCC*, 541 F.2d 346, 355 (3d Cir. 1976); *United Telegraph Workers v. FCC*, 436 F.2d 920 (D.C. Cir. 1970).

Of course, § 214 also applies to abandonment of service, *see* note 24 *supra*, but no one has so far contended that Execunet will have any impact, adverse or otherwise, on provision of pre-existing MCI services.

[52] In the first Western Union Mailgram case, *United Telegraph Workers v. FCC*, *supra* note 51, the Telegraph Workers sought to force the FCC to enjoin Mailgram service pending a hearing at which § 214 issues could be ventilated. The Commission, on the other hand, maintained that the Mailgram tariff should be processed in the same manner as any other tariff filing. This court sided with

> nothing in this section [214] shall be construed to require a certificate or other authorization from the Commission for any • • • changes in plant, *operation,* or equipment, *other than new construction,* which will not impair the adequacy or quality of service provided. [53]

Moreover, we do not agreed with the suggestion of Commission counsel in brief [54] that Judge Wilkey's opinion in *Hawaiian Telephone Co. v. FCC,* 498 F.2d 771 (D.C. Cir. 1974), somehow transmogrifies Section 214(a) so that carriers must now obtain Commission approval before they implement new services.[55] In *Hawaiian Telephone* this court reversed a grant of Section 214 authority to RCA Global Communications, Inc. on the ground that the Commission was allowing competition merely for competition's sake in direct violation of the teaching of the Supreme Court in *FCC v. RCA Communications, Inc.,* 346 U.S. 86 (1953). In stating the proper standard

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the Commission on the ground that (with exceptions not relevant here) § 214 did not apply to even this novel use of existing facilities. *See* 436 F.2d at 924-925.

[53] 47 U.S.C. § 214(a) (1970) (emphasis added); *see* note 24 *supra.*

[54] FCC brief at 24 & n.14, 32 n.23.

[55] If this were the case, then there would obviously have been no need for the rulemaking in Docket 19117 which proposed rules that would have required "common carriers [to] request prior Commission approval before offering or discontinuing any new or revised classification of communications, irrespective of whether offered over proposed new facilities or over facilities previously authorized by the Vommission [sic]." *Notice of Proposed Rule Making, supra* note 9, 27 FCC2d at 38-39. Similarly, if the Commission is now correct, then both the Commission and this court were in error in *United Telegraph Workers v. FCC, supra* note 51. *See* note 52 *supra. See also MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 38 ("a carrier need not generally file an application [under § 214] for each new service it wishes to implement").

to be applied under Section 214(a) Judge Wilkey wrote: "When the FCC considers an application for certification of a new line, it must start from the situation as it then exists, and must * * * determine whether indeed the public convenience and necessity requires more or better *service.*" 498 F.2d at 776 (emphasis added). We do not read this statement to suggest that every time a carrier seeks to start a new service over existing facilities it must petition the Commission under Section 214(a), but rather it is merely a matter of fact observation that it is analytically impossible to determine the need for a new facility without considering the services to be provided over it. In addition, the reading suggested by the Commission would nullify the final proviso of Section 214(a) by requiring a "certificate [and] other authorization from the Commission" prior to changes in carriers' operations even if such changes did not effect the "adequacy or quality" of the carriers' preexisting services. There is no indication that the *Hawaiian Telephone* court contemplated such a remarkable result. Nor indeed can such a result be justified by reference to the primary purpose of Section 214 because, so long as the "adequacy or quality" of the service proposed in a Section 214(a) application is not impaired by provision of other services, the public need that justified construction of facilities will still be met and there is no sense in which those facilities would have become needlessly duplicative.

Notwithstanding the proviso to Section 214(a), Section 214(c) gives the Commission authority to [58]

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[58] Section 214(c) provides:

> The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such

> issue such certificate [facility authorization] as applied for • • • or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions *as in its judgment the public convenience and necessity may require.* • • •

(Emphasis added.) Used to condition the services an individual carrier may offer, Section 214(c) would provide a power over individual carriers in all respects identical to its power over classes of carriers under Section 303(b), which was held in *Press Wireless, Inc. v. FCC, supra,* to give the Commission authority to create a prior approval requirement. For this reason Section 214(c) does, in our judgment, authorize the Commission to restrict the services that may be offered over a communication line once it is built, acquired, or extended. *Cf. Western Union Telegraph Co. v. FCC,* 541 F.2d 346, 355 (3d Cir. 1976). However, since any prior approval requirement is in derogation of the legislative compromise embodied in Sections 203-205, the Commission must strictly follow the terms of Section 214(c) and it cannot impose any such restriction unless it has affirmatively determined that "the public convenience and necessity [so] require."

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terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operaton, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

47 U.S.C. § 214(c) (1970).

C.

With the framework of our inquiry in mind, we turn next to the question whether the Commission was correct in concluding that the *Specialized Common Carrier* decision was a lawful exercise of Section 214(c) authority. As we understand the Commission's opinion on remand, there are two considerations supporting its view that the *Specialized Common Carrier* decision restricted the services specialized carriers can offer—first, the fact that only private line services were before the Commission in Section 214 applications[57] and, second, that the Commission's analysis of cream-skimming assumed that specialized carriers would be restricted to private line services.[58] We consider these in turn.[59]

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[57] *See* note 29 *supra*.

[58] [O]ur analysis of possible revenue diversion (29 FCC2d at 911-914) dealt only with the private line revenues of these two carriers. Further, we recognized that SCCs would not compete directly with the established carriers' message services.

> "There is no reason to believe that [nationwide average] pricing of the interstate message service offerings of the Bell System and Western Union (such as MTT, WATS, and public telegraph) need be altered by new entry into the developing specialized communications market. Clearly, none of the uniform rate structures of the existing carriers for such services would appear in jeopardy *since those services are not being challenged competitively to any substantial degree by the services proposed to be offered by the aspiring new entrants.*" 29 FCC2d at 915 (emphasis added)[.]

MCI Telecommunications Corp., supra note 1, 60 FCC2d at 36.

[59] The Commission offered two other considerations in support of its interpretation of *Specialized Common Carrier Services, supra* note 26. First, it concluded that specialized carriers would not duplicate services already being offered, whereas in the Commission's view Execunet would duplicate MTS. We fail to see the relevance of this assertion in light of *AT&T v. FCC, supra* note 26.

The Commission also pointed to statements made by the Ninth

We can assume, without deciding, that a service like Execunet was not within the contemplation of the Commission when it made the *Specialized Carrier* decision. Nonetheless, it is readily apparent that failure to consider the public interest ramifications of a service—either pro or con—during resolution of a Section 214(a) application is simply not the same thing as an affirmative determination that the "public convenience and necessity may require"[80] a restriction on a facility authorization limiting a carrier to provision solely of those services proposed in its Section 214(a) application.

The Commission's analysis of cream-skimming in the *Specialized Common Carrier* decision similarly gives no

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and Third Circuits in, respectively, *Washington Utilities & Transportation Comm'n v. FCC, supra,* note 26, and *Bell Telephone Co. v. FCC, supra* note 26. In *Washington Utilities,* however, the scope of the services authorized in *Specialized Carriers* was not at issue; the reference is simply a general description of the services proposed in the applications before the Commission. The *Bell Telephone* case involved a very different issue, namely, whether the Commission had affirmatively determined that it would be in the public interest to require AT&T to interconnect with MCI for the purpose of allowing MCI to offer FX and CCSA service. *See* 47 U.S.C. § 201(a) (1970). The Commission's view was that *Specialized Carriers* had settled the point, whereas AT&T argued that, since MCI had never mentioned FX and CCSA services in its § 214(a) applications, MCI's provision of those services had not been approved even if some other carriers' might have been. The Third Circuit held that the Commission in *Specialized Carriers* had made an affirmative determination that interconnection for provision of private line services was a general matter in the public interest and that MCI was covered by this general determination. *Bell Telephone* therefore stands for the proposition that the Commission in *Specialized Carriers* decided at least that specialized carriers could provide all private line services. However, one cannot reason from this proposition to its converse—that specialized carriers may offer only private line services—yet the converse is the issue relevant under § 214(c) as we explain in text.

[80] 47 U.S.C. § 214(c) (1970).

evidence that the Commission made an affirmative finding that revenue diversion would be a problem if specialized carriers were allowed to compete on the fringes of the message telephone service market as MCI allegedly proposes to do. No such issue was before the Commission in that proceeding. As it has repeatedly asserted here, all it had to consider was whether the competition proposed in the Section 214 applications before it raised serious revenue diversion problems threatening the public interest. This is all it apparently did decide:

> [W]e do not see how there could be any diversion of revenues of a magnitude to have the impact claimed by AT&T, in view of the very small percentage of AT&T's existing total market that is vulnerable to competition of the kind proposed here, the growth rate of Bell's basic services, and the likelihood that AT&T would obtain a very substantial share of the potential market for specialized services.[61]

Moreover, the Commission's staff report, which formed the basis for the *Specialized Carrier* decision, ruminated more broadly on the issues posed by revenue diversion and it appeared highly skeptical of the validity of AT&T's overall argument.[62] Thus there is simply nothing in *Specialized Carriers* that would support a conclusion that revenue diversion required restrictions on MCI's facility authorizations.[63]

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[61] *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 910.

[62] *See id.* at 883-884.

[63] It should also be noted that subsequent to *Specialized Carriers* the Commission has indicated a willingness to consider competition in the message telephone field on its merits. *See Domestic Communications-Satellite Facilities*, 35 FCC2d 844, 853-854 (1972). To a large extent this undercuts the Commission's argument here, *see* note 39 *supra*, that it conferred a statutory monopoly on AT&T in this field.

Finally, it should also be noted that the Commission staff, in its report adopted by the Commission,[64] dealt explicitly with the question of how the Commission ought to deal with possible adverse impacts of service offerings other than those which were before the Commission in the *Specialized Common Carrier* decision:

> In the event that adverse consequences to the public should develop, the Commission can take such action *on the relevant tariff filings* as may be necessary protect the public. We think that in the context of the matters now before the Commission involving proposed new and different services, *a question of this nature is more appropriately considered in connection with the tariffs rather than upon authorization of the facilities.*[65]

And, again, the staff wrote:

> The results of any authorizations would be the object of close and continuous scrutiny by the Commission. Should adverse consequences develop or appear imminent, the Commission can take such remedial action or precautionary measures as may be necessary to protect the public. *As indicated, appropriate action can be taken in connection with the tariffs.* In addition, any renewal of license for the proposed facilities would require a public interest finding and could be subject to any needed conditions. Moreover, the Commission's broad rule making powers are always available. * * *[66]

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[64] *See Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 920 (¶ 103) ("In light of all of the foregoing and the record as a whole, we adopt our staff's analysis * * * as amplified and modified herein."). There is no indication that the Commission "modified" the staff's analysis of the points relevant to this appeal.

[65] *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 886 (emphasis added).

[66] *Id.* at 887 (emphasis added).

The undeniable import of the staff's analysis is that questions related to the future impact of specialized carrier service offerings other than those immediately at hand in the *Specialized Common Carrier* case should be resolved in other proceedings—in tariff procedings, upon license renewal, or by further rulemaking. Strikingly absent from this list is a mention of further Section 214 proceedings.

For the reasons stated above the Commission's *Specialized Common Carrier* decision cannot reasonably be read to have made an affirmative determination that the public convenience and necessity required "private line" restrictions on the facilities authorizations of specialized common carriers.[87] Instead, it appears that the Commission saw benefits accruing to the public from the services which were before it. In granting the facilities authorizations on the basis of that public interest finding, the Commission did not perhaps intend to open the field of common carrier communications generally, but its constant stress on the fact that specialized carriers would provide new, innovative, and hitherto unheard-of communications services clearly indicates that it had no very clear idea of precisely how far or to what services the field should be opened.[88] As indicated in the staff report, a decision was apparently made to consider the consequences of future developments in appropriate future proceedings. There being no affirmative determination

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[87] For this reason the deference normally owed to our agency's interpretation of its own decisions, *see, e.g., Udall v. Tallman*, 380 U.S. 1, 16 (1965), is not appropriate here. *See id.* at 18.

[88] *See Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 905-914 (¶¶ 65-86). Indeed, to the extent that any definition of a specialized common carrier emerges from the Commission's discussion, that definition appears to be simply that a specialized carrier is any carrier that does not attempt to optimize its service offerings to the voice communications needs of the general public. *See id.* at 882 (¶ 29); *id.* at 906-907 (¶¶ 69-70).

of public interest need for restrictions, MCI's facility authorizations are not restricted and therefore its tariff applications could not properly be rejected.

D.

As a final and somewhat collateral point, we are concerned with a thread running through the Commission's analysis—that the *Specialized Carrier* decision granted AT&T a *de jure* monopoly over MTS and WATS service which would be undermined were MCI allowed to provide Execunet—because any such assertion is plainly incorrect and may have influenced the Commission's disposition of the instant case.

As the Commission staff explained in *Specialized Carriers,* absence of competition in the "general domestic common carrier service field • • • is due primarily to the fact that until the filing of [MCI's first Section 214 applications] the Commission had no occasion to consider applications for competitive service in this area."[49] The question whether AT&T should be granted a *de jure* monopoly was not among those proposed to be decided in *Specialized Carriers,* and nowhere in that decision can justification be found for continuing or propagating a monopoly that, according to the staff, had theretofore just grown like Topsy. Of course, there may be very good reasons for according AT&T *de jure* freedom from competition in certain fields; however, one such reason is not simply that AT&T got there first. Indeed, the Commission's attempt here to imbue AT&T's existence with public interest significance represents a retrenchment from the position it took in passing on a proposal to enter the MTS field via domestic communications satellites: "[W]e should not reject any proposal that might prove feasible and beneficial to the public simply because it represents some departure from the established scheme."

[49] *Id.* at 881.

Domestic Communications-Satellite Facilities, 35 FCC2d 844, 854 (1972).

Because the Commission has not so far determined that the public interest would be served by creating an AT&T monopoly in the interstate MTS field, it may not properly draw any inferences about the public interest from the bare fact that another carrier's proposed services would compete in that field.

III. Conclusion

We have today decided that the Commission erred in rejecting MCI's Execunet tariff as unauthorized. The Commission has no general authority to insist that carriers receive its approval before filing tariffs proposing new services or rates. Only if the Commission has determined that the public convenience and necessity may require that new services receive advance approval can it then reject a tariff as unauthorized. In so holding we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings. In that eventuality the Commision must be ever mindful that, just as it is not free to create competition for competition's sake,[70] it is not free to propagate monopoly for monopoly's sake. The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of *de facto* monopoly.[71]

Reversed and Remanded.

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[70] *See FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953); *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776-777 (D.C. Cir. 1974).

[71] *Cf., e.g., Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958).

APPENDIX B

F.C.C. 76-622

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 20640

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION

Investigation into the lawfulness of Tariff FCC No. 1 insofar as it purports to offer Execunet service

Decision

(Adopted: June 30, 1976; Released: July 13, 1976)

BY THE COMMISSION: *CHAIRMAN WILEY NOT PARTICIPATING; COMMISIONER HOOKS CONCURRING IN THE RESULT.

1. This matter is before us on grant of a Motion To Hold in Abeyance we filed before the United States Court of Appeals for the District of Columbia in the case of *MCI Telecommunications Corporation* v. *FCC*, Case No. 75-1635. That case involves MCI's appeal of an earlier Commission Order, FCC 75-799, adopted July 2, 1975, which found Execunet to be essentially message telecommunications service (MTS) rather than private line service. Since we found therein that MCI Telecommunications Corporation (MCI) was authorized to offer only private line service, we rejected the tariff for Execunet and ordered MCI to cease offering the service within thirty days. The D.C. Circuit granted MCI a stay of that order.

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* Commissioner Hooks issued a concurring statement to our *Memorandum Opinion and Order* released May 17, 1976, FCC 76-442, in which Commissioner Robinson joined. This statement is attached to this Decision.

2. In granting our motion to hold the appeal in abeyance, the Court remanded the case upon our representation that we would consider certain arguments made by MCI on appeal which had been mentioned only briefly before the Commission. Accordingly, we instituted the present proceeding by Memorandum Opinion and Order released December 3, 1975, 57 FCC 2d 271. Because the facts of this case were essentially not in dispute, and in view of the Court's order, to expedite the proceeding, the procedures employed included two rounds of comments from all interested persons, and oral argument. Comments and reply comments were filed by MCI, American Telephone and Telegraph Company (AT&T), American Satellite Corporation (ASC), Southern Pacific Communication Corporation (SPCC), GTE Service Corporation (GTE), United States Independent Telephone Association (USITA), Continental Telephone Company (Continental), and RCA Global Communications, Inc., as trustee (RCA Globcom). Oral argument was held on May 24, 1976.

Background

A. *July 2nd Order and Appeal*

3. In our July 2, 1975 Order we rejected MCI Telecommunication Corporation's Tariff FCC No. 1 insofar as it purported to offer Execunet service, upon our finding that, contrary to MCI's assertions, Execunet was not in fact a private line service, and that MCI had not received a prior authorization to offer any service other than a private line service.[1]

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[1] Execunet's characteristics are summarized as follows. A customer in the calling city calls the local MCI office via local exchange telephone service from any push-button telephone in the loca exchange area. A rotary-dial telephone can also be used if the caller has a touch-tone pad (tone generator). This device can be purchased in the open market from numerous sources. He then pulses his customer code and the area code and calling number of

4. We found on the basis of MCI's own description of Execunet in its letter to the Chief, Common Carrier Bureau, dated June 5, 1975 (see Appendix B) especially paragraph 4, that Execunet, like MTS, had the following characteristics:

(1) ". . . the intercity facilities used for Execunet are shared by all users of the service . . ."

(2) ". . . Execunet can be accessed directly from any push-button telephone (or from any telephone, using a separate tone generator) in the calling city to call any telephone in any one of a number of distant cities . . ."

(3) ". . . the Execunet customer uses common local exchange plant at both ends . . .", and

(4) ". . . the Execunet customer is billed for each call, based upon time and distance, subject to a monthly minimum, with no charge added at the distant city . . ."

5. We concluded that these were basic similarities to MTS, the combination of which "under the factual situation presented here, inescapably leads the Commission to conclude that . . . Execunet service is essentially a switched public message telephone service, rather than private line."

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any telephone in one of a number of distant cities. Connection at the distant end may again be accomplished via the local exchange telephone service in that area. Upon connection, the customer is charged a per-minute toll, based upon the mileage to the city called, subject to a connection charge and a monthly minimum charge. Any MCI Execunet customer in the calling city can access the system at any time to place a call, and presumably many such customers may utilize the intercity facilities simultaneously. In other words, none of the MCI plant, or indeed any of the plant used in completing the call, is dedicated to the use of a particular customer during any specified time; rather it is available upon demand.

6. We then examined our policy as expressed in our *Specialized Carrier Decision* in Docket No. 18920, 29 FCC 2d 870 (1971), as well as the conditions we had placed upon MCI's facility authorizations. Based upon MCI's description of Execunet, our specialized carrier policy and the restrictions we had placed on MCI's authorizations, we concluded that MCI was authorized to offer only private line service, not MTS, and therefore that this offering was unlawful on its face. We then rejected the tariff, citing *Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir., 1959), and allowed MCI a thirty day period in which to discontinue service, so that MCI's customers could arrange for alternative service.

7. MCI petitioned the United States Court of Appeals for the District of Columbia for review of our Order. In its Stay motion, MCI argued that our action in the Execunet proceeding violated basic concepts of fundamental fairness by failing to accord MCI (1) sufficient notice of an investigation concerning its Execunet service, (2) any opportunity for a hearing respecting the facts of the service, or (3) any notice that we might take action without instituting formal proceedings, and (4) that the occurrence of *ex parte* presentations by representatives of AT&T about the nature of Execunet obligated us to hold an evidentiary hearing to allow MCI to set the record straight. In addition, MCI argued that Docket No. 19117 had modified the specialized common carrier policy in a manner to permit MCI to provide *any* common carrier service merely by filing a tariff revision.

8. In Court, MCI claimed that the principal issue in the Execunet proceeding was that we had ordered MCI to discontinue Execunet service without notice and without opportunity for hearing. MCI also contended that it had not been informed of the full extent of AT&T's off-

the-record arguments against Execunet. Without that information, it was deprived, it claimed, of any opportunity to meet those arguments and, in turn, to present rebuttal evidence. AT&T's presentations, MCI contended, constituted a systematic lobbying effort which effectively predetermined the proceeding's outcome and deprived MCI of due process. Finally, MCI argued that we had a duty to notify it of the pending adverse action and to supply a summary of the factual basis for the action, before ordering the discontinuance of Execunet.

9. Since some of these arguments had not been fully put before us and thus not fully addressed, we requested the Court to remand the proceeding in order to allow us to review these arguments thoroughly. The Court granted the motion and directed that further proceedings "be conducted and concluded expeditiously." See *MCI Telecommunication Corporation* v. *FCC, supra.* Consistent with the Court's order, we called upon MCI and other interested parties to file comments and reply comments regarding the lawfulness of MCI's offering of Execunet service.

10. On December 15, 1975, MCI filed a series of motions including a motion to modify procedures, a motion for initiation and conduct of a special evidentiary hearing to look at AT&T's allegedly improper contacts with the Commission, a motion to take the deposition of a certain AT&T employee, a motion to preserve evidence, and a request for admission of fact by the Commission. In a Memorandum Opinion and Order, FCC 76-31, released January 23, 1976, we dismissed as moot MCI's motion to preserve evidence since AT&T had stated it would preserve all relevant information in its possession. In addition, we stated we would act on MCI's other motions in a timely fashion and in accordance with due process.

11. We determined that prior to ruling on these motions the best procedure was to schedule oral argument.

In *MCI Telecommunications Corporation*, 58 FCC 2d 962, released March 26, 1976, we asked parties participating in the oral argument to be prepared to discuss, *inter alia*, the following issues:

a. What class or classes of service is MCI permitted to offer pursuant to its facility authorizations and Commission policies?

b. What changes, if any, were made to the permitted classes of service by our Report and Order in Docket No. 19117, 39 FCC 2d 131 (1973)?

c. Is Execunet service, as presently offered, a private line service?

d. Were any communications between parties to this proceeding and the Commission, as developed by filings herein, in violation of any applicable statute or regulation?

e. If any prohibited contacts occurred, what effects have they had on the substance of this proceeding?

f. Whether any further proceedings are required to comport with the requirements of due process of law.

MCI then filed motions requesting an evidentiary hearing on certain specified "disputed questions of fact." It sought a hearing to determine the accuracy of our statement that the staff had raised questions about the lawfulness of MCI's metered use tariff prior to the AT&T contacts and pleadings. MCI also renewed its motion for an evidentiary hearing concerning AT&T's presentation and asked that the oral argument be held in abeyance pending the outcome of the proceedings it had requested. By an Order, released May 17, 1976, we stated that we would determine whether further proceedings were warranted at the conclusion of the oral argument. On May 20, 1976,

MCI filed a "Memorandum for Oral Argument" restating its contention that an evidentiary hearing concerning AT&T's presentations was necessary prior to the May 24, 1976 oral argument. Also on May 20, 1976, MCI filed a "Motion for Inquiry into the Public Interest Consideration Regarding Establishment of a Communications Monopoly" asking that we begin an inquiry concerning whether a need for an MTS monopoly exists and, if so, the outer boundaries of that service offering.

B. *Events Prior to Execunet Order*

12. A full understanding of this proceeding requires a review of the events and filings leading to our July 2 rejection of the Execunet offering. The following narrative is drawn from the pleadings and affidavits filed by MCI and AT&T with the Court and with us.

13. In early September, 1974, MCI initiated a meeting with the Bureau staff to explain a proposed metered use service to be instituted by a tariff revision. The metered use service would make possible payment of charges by private line subscribers on a time and distance sensitive basis. The conversations with the staff served mainly to alert the staff that MCI would file within a short time tariff modifications effecting the metered use service and other private line communications features MCI considered innovative. Following the filing of the tariff revision, there were a series of meetings between the staff and MCI's representatives concerning the meaning of metered use service and other tariff matters. At this point the term Execunet was not used and the tariff did not describe the scope of services that MCI intended to provide. MCI, however, filed an amendment to clarify the meaning of its tariff. This amendment explained how metered service would use local business telephone lines and private lines to access exchanges in distant cities. According to the amendment, when a number of custom-

ers shared a local business telephone line, MCI would prorate the monthly charge. The tariff did not indicate that the sharing would involve an unlimited number of unspecified customers, i.e., all subscribers to a particular service. To help clarify the meaning of its tariff, the staff requested MCI to file a glossary of complete and clear definitions of the terms in its tariff. MCI promised to do so and the revisions became effective pursuant to law on October 10, 1974.

14. The staff and MCI met again in November to discuss the filing by MCI of a glossary defining terms used in the tariff filings and also the services contained in marketing brochures. A third meeting was held in December concerning the glossary MCI had promised to provide. At this time representatives of MCI explained that some additional time was still necessary to provide the glossary since the tariff was organized on a modular framework, rather than in terms of marketing packages offered to customers. According to MCI, this approach allowed it to tailor services to a particular customer's needs. However, MCI stated that to retain this flexibility each functional component must be set forth separately in the tariff, thus making it difficult to set forth clearly the various service arrangements possible under the tariff. According to an MCI affidavit dated July 3, 1975 and filed with the Court, MCI also indicated at that meeting, or shortly thereafter, that it would begin marketing the Execunet service in January 1975, and agreed that "Execunet" would be included in the glossary when it was prepared.

15. According to an affidavit filed with us, AT&T became aware in late October, 1974, that MCI was ordering a substantial number of local exchange lines, MCI had informed AT&T's local operating companies that it intended to use those local exchange lines in conjunction with its newly instituted metered use service. After ap-

parently attempting without success to clarify MCI's meaning of metered use service, AT&T by letter dated November 6, 1974, requested MCI to respond to several questions regarding the scope of tariff revision. AT&T alleged that the tariff material was inadequate for a determination of whether use of the local exchange service by MCI violated resale restrictions in AT&T's private line tariff, FCC No. 260. In reply MCI requested tariff information from AT&T, to which AT&T responded by letter on December 3, 1974. AT&T states that it provided MCI with the information it sought and again asked MCI to provide the Metered Use Service clarifications it had earlier requested. According to AT&T, MCI never responded. (The exchange of correspondence is contained in an attachment to an affidavit filed with us on December 29, 1975.)

16. By January, 1975, MCI was offering Execunet service to the public. MCI states that at that time it informally provided Execunet marketing brochures to Commission personnel. AT&T states in its December 29, 1975 affidavit that it did not become aware of the Execunet offering until March, 1975, when Execunet marketing brochures were brought to its attention. Subsequently, by subscribing to the service through an intermediary it determined the nature and characteristics of Execunet.

17. As a result AT&T concluded that MCI was illegally providing Execunet. AT&T then orally informed various Commission personnel of its beliefs and the reasons for them. AT&T, in its affidavit, dated December 29, 1975, filed with us, states that in describing the service to Commission personnel, it relied on Execunet marketing brochures, a transmittal letter from MCI to prospective Execunet customers and copies of the AT&T and MCI correspondence concerning AT&T's request for clarifications of the meaning of metered use service. AT&T also acknowledges that it demonstrated the service from tele-

phones with the occasional aid of a touch tone pad. According to AT&T's affidavit, no other materials were used in its presentations. In the course of its conversations, AT&T urged the Commission personnel to take action to stop what it considered an unlawful service. Without in any way indicating what action we might take on our own motion, the Bureau staff reminded AT&T that there were both formal and informal complaint procedures which it could follow. Accordingly, AT&T filed a complaint on May 19, 1975 requesting the Commission to take action against Execunet. AT&T states in its affidavit that it ceased discussing Execunet service with the Commission on May 15, four days before it filed its informal complaint.

18. On May 21, 1975, the Common Carrier Bureau referred a copy of the AT&T letter to MCI. The cover letter stated that AT&T had alleged that "Execunet service is not properly tariffed with this Commission, and that the service constitutes the provision of long distance message telephone service which MCI is not authorized to provide." The Bureau then requested MCI to comment on AT&T's allegations.

19. On June 5, 1975, MCI replied stating that Execunet is a private line service comparable to other private line offerings, and that the tariff contained a description of all the components necessary to offer and provide the service and determine charges. In addition, MCI described in detail the fundamental characteristics of Execunet.

20. On June 9, 1975, MCI filed a letter stating that while its letter of June 5 had "competently and completely" answered AT&T's objections about Execunet service, it was concerned about the staff's handling of AT&T's written allegations as well as about the matter of "lobbying" at the Commission. MCI claimed that AT&T had used "sophisticated presentation techniques . . . to spur some members of the Commission's staff to pre-judge the matter before MCI had had even the chance to present its

side of the story." It stated that it "was not requesting a hearing on this matter." Instead it asked for "equal time" with those persons to whom AT&T had presented its arguments.[2] MCI proposed that we initiate an investigation including an immediate request for the names of the AT&T personnel who participated in the lobbying, the identification of the personnel to whom AT&T's views were presented, the date and length of those conversations, what brochures or other material were used, the substance of the oral presentations made, and other information. At the conclusion of the proposed investigations, MCI asked that this information be made available to it along with an opportunity to rebut AT&T's arguments.

21. On June 13, 1975, AT&T replied to MCI's assertion that "Execunet is a private line service." In addition to submitting an analysis of the differences between private line services and Execunet, AT&T attacked MCI's "lack of candor" in submitting "confusing and inadequate" tariff materials and its failure to supply any of the facts requested by AT&T relating to Execunet. Despite MCI's assertion that its service components were set forth in its tariff in a modular framework, AT&T claimed it had been unable to put together the individual tariff components so as to describe Execunet service.

22. On June 16, 1975, the Chief, Common Carrier Bureau responded to MCI's protest of June 9 about the manner and depth of AT&T's off-the-record presentations. The letter reminded MCI of the staff's initial view that its tariff revisions filed in September were in need of clarification and MCI's "standing commitment' to file an

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[2] It should be noted that it is common for members of the public and carriers to orally bring their complaints to the attention of the Commission. MCI, itself, has made such presentations. This practice was implicitly recognized by MCI and formed the basis for its request for "equal time."

administrative tariff containing a clear explanation of the tariff terms and descriptions. After MCI's lengthy delay in filing that information, first requested nine months earlier in September 1974, the Chief, Common Carrier Bureau stated he did not consider a requirement for the prompt exchange of correspondence unusual. He added that AT&T's letter "merely highlighted" an important problem already recognized by members of the staff. In conclusion, he stated that the Bureau was of the opinion that conversations between a member of the Commission or staff with a carrier does not automatically entitle another carrier with an opposing viewpoint to "equal time."

23. MCI filed a third letter on July 1, 1975. The letter stressed MCI's concern that we might act on Execunet in the near future without having heard both sides of the case. While stating that "[i]t agrees informal communications are highly desirable and indeed necessary to the functioning of an administrative agency like the Commission," MCI reiterated its objections to AT&T's presentations. MCI perceived these contacts to be "a very extensive off-the-record presentation of AT&T's position to key Commission personnel at a time when AT&T must have known that, if the agency could not be moved to act on its own motion, the Company planned to file a complaint about the matter." MCI requested that any action concerning Execunet await a further filing containing a point by point rebuttal of AT&T's on-the-record arguments. MCI then argued for the first time that our action in Docket No. 19117 broadened MCI's authorization to provide common carrier service beyond the specific limitations of the specialized common carrier policy. Taking into consideration all the arguments before us, we adopted an Order directing MCI to discontinue Execunet service. As is evident from the order itself, our decision was based only on the materials filed with us by AT&T and MCI.

C. *Substantive Arguments*

24. This section summarizes the parties' position as to the lawfulness of MCI's offering of Execunet service and our right summarily to reject MCI's tariff. MCI puts forth six principal alleged errors in the July 2 Order which rejected the service offering and asserts the following counter arguments under which the service would be lawfully offered:

(a) *Execunet is within the class of service which MCI is authorized to offer.* The *Specialized Common Carrier* decision, *supra,* permitted competition for "specialized" and "innovative" services and did not limit competitors to the private line field. Even if that decision did limit the competitors, the Commission's Report and Order in *Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities,* Docket No. 19117, 39 FCC 2d 131 (1973) removed all restrictions which appeared in the *Specialized Common Carrier* decision and domestic facility authorizations as to the types of services which could be offered using those facilities. Accordingly, a carrier need not obtain prior Commission authorization of new services.

(b) *Section 21.705 of the Commission's Rules permits a carrier to introduce new services by filing a tariff revision.* That section reads in part: "Stations in the [domestic public radio] service are authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization . . ." Since Docket 19117 removed all restrictive conditions on MCI's authorizations, this section permits MCI to offer any new service which uses existing facilities through the filing of a tariff revision.

(c) *The Commission does not have the authority summarily to reject a tariff unless it is "so patently a nullity as a matter of substance law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket." Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1346 (D.C. Cir., 1971). Since this filing is not unlawful on its face, the Commission can examine it only through a hearing initiated pursuant to Sections 204 and 205 of the Act.

(d) *Execunet is an entirely new service offering, not MTS, which has characteristics essentially similar to those of private line service.* However, Execunet cannot be characterized in either classification since it is an entirely new communications service.

(e) *The Commission has never determined that AT&T should have a monopoly over interstate MTS.* Therefore, even if Execunet were characterized as MTS, MCI could lawfully offer it in competition to Bell.

(f) *Since Execunet is a new, innovative communications service, which subscribers find meets an otherwise unmet need, the public interest would not be served by discontinuing the service.*

25. MCI also supplied a number of affidavits from company officials, Execunet subscribers and from William H. Melody, economic consultant. The subscribers essentially assert the importance of Execunet to them and the otherwise unfulfilled communications requirements which the service provides. Melody avers that the projected revenue shift from the Bell System as a result of Execunet ($37 million) is minor and will have little or no impact on Bell's ability to continue to provide high quality communications service.

26. The other attachments to MCI's comments consist of lengthy affidavits from Bert C. Roberts, Jr., Vice President, and William G. McGowan, President and Chief Executive Officer of MCI. These affidavits expand upon certain of the substantive allegations made in MCI's comments. Mr. Roberts lists what he contends to be the differences between Execunet and MTS and the similarities between Execunet and private line services. These will be discussed *infra*. He also enumerates five alleged errors in the discussion of similarities between Execunet and MTS which appeared in our July 2 Order. These are:

(a) ". . . both use nondedicated local and intercity facilities . . ." Mr. Roberts characterizes the intercity lines used for Execunet as dedicated to users of this service and not used by subscribers to any other MCI service. In addition, he contends that the local business lines subscribed to by MCI are likewise dedicated to Execunet customers' use. Finally, customers have the option of subscribing to a dedicated local loop for use in connection with this service.

(b) ". . . both are accessible on demand by any customer . . ." While MTS can be used by any person anywhere in the country, with no minimum volume required, Mr. Roberts describes Execunet service as limited to fifteen cities, accessible only by its customers, subject to a $75 per month minimum charge, and accessible only from push-button telephones. He also notes that, while MTS is marketed to the general public, Execunet is intended for only that class of users with at least $75 in monthly toll charges to the cities which Execunet serves.

(c) ". . . both charge on a per call basis . . ." While MTS is charged only on a per-call basis, Mr. Roberts notes that Execunet is subject to a $75 per

month minimum, can be subscribed to only for a minimum period of a month, can be cancelled only on a thirty days' notice, is not subject to peak/off-peak pricing, and is charged on the basis of total minutes of connect time to a given distant city per month. Finally, the subscriber to Execunet must pay a prorated share of the local termination charge.

(d) ". . . both are available from any telephone in the calling city (Execunet is subject to the push-button telephone limitation, but this is caused only by technical limitations) . . ." Mr. Roberts points to the fact that Execunet is accessible only within certain (currently 15) cities, while MTS is available everywhere, and he asserts that the push-button telephone restriction is a more significant difference than the Commission's Order implies.

(e) ". . . and both may be used to call any telephone in one of a number of distant points." While MTS is available to call any telephone in the country, Mr. Roberts asserts that the limitation of Execunet to 15 cities is a difference in kind rather than degree between the two services.

27. Finally, Mr. McGowan reiterates that Execunet, which he characterizes as shared private line service, is a separate class of service from those services offered by other carriers, and that MCI has proposed the sharing of private line channels as early as 1969. He further claims that our Execunet decision is a step back from full and fair competition, and that the real issue is whether AT&T may impose its definition, "through the FCC," of what the competitors may offer "in order that these competitors may eventually be squeezed out of business."

28. AT&T disputes MCI's contentions and asserts that we should reaffirm its July 2 Order. Bell's principal arguments can be divided into three points:

(a) *Commission policy precluded competitive entry into the MTS business.* Both the conditions placed on MCI's Section 214 authorizations and the policies established in the *Specialized Common Carrier* decision, *supra,* make this policy evident. The Commission has made very clear its view of MTS as a monopoly service, and departure from this policy would undermine AT&T's services and destroy the nationwide MTS price averaging structure. MCI has proposed in Docket No. 18920 that it would offer only customized point-to-point services and never stated that it would seek to compete with Bell in providing local exchange or long distance toll telephone service.

(b) *MCI has never sought or obtained Commission authorization to offer services other than those which are consistent with the policies established in the Specialized Common Carrier decision, i.e., private line services.* Without a formal application it cannot offer other services, since the Commission has never permitted competition in the MTS business.

(c) *Execunet is not a private line service.* Rather it has the fundamental characteristics of message toll service; it is a service among many points on an exchange basis, facilities are used in common with other Execunet subscribers, a new switching connection is required for each call and it is charged on per-call usage-sensitive basis. By contrast, private line is a service between designated points facilities are designated for the use of a single subscriber, a new connection does not have to be made for each call and charges are made on a fixed, periodic basis.

29. Both ASC and SPCC recognize the possible broad applicability of this decision and therefore ask us to con-

fine our decision as narrowly as possible—if we should find Execunet unlawful—in order not to rule out any proper innovative services currently being planned. RCA expresses the same concern but further asserts that our policy does not limit the SCCs to private line services but merely requires that they offer "specialized communications services."

30. GTE, USITA and Continental agree with AT&T that Execunet has most of the characteristics of MTS station-to-station direct dial service. They assert that Execunet is not a private line service (specifying alleged differences), and that it cannot be compared to foreign exchange (FX) service. Since MCI's facility authorizations and our policies allegedly limit MCI to private line services, including FX, they claim that MCI is not authorized to offer Execunet service, and that we should reaffirm its rejection.

31. In reply, MCI alleges that we did not intend to limit the SCCs to private line services but rather spoke in terms of "customized services" and "specialized communications" in Dockets 18920 and 19117. MCI also disputes AT&T characterization of Execunet and claims that it is a private line service which falls within MCI's broad authorizations, not functionally similar to MTS. AT&T and USITA, in reply, dispute MCI's position and express views similar to those in their initial comments.

D. *Substantive Analysis*

32. Determination of the lawfulness of MCI's Execunet offering is dependent upon three basic issues:

(a) Are MCI's authorizations, based upon policies established in Docket No. 18920, limited to the offering of private line services, or if not, is MCI otherwise limited in the services it may offer?

(b) If the above limitations existed, were they modified as a result of our Report and Order in Docket No. 19117 and Section 21.705 of our Rules?

(c) If MCI is limited to private line services, is Execunet a private line service?

a. *Facility Authorizations and Docket 18920*

33. Our July 2 Order (pages 2-3) quoted language from a number of MCI facility authorizations as limiting the use of the facilities to services which are "essentially private line for the transmission of data, facsimile, control, remote metering, voice and other communications." This language was taken from MCI's applications and, as will be seen, is similar to MCI's description of its own services in proceedings both before us and before the courts. As MCI points out, however, not all of its authorizations contain similar language, some contain no such restrictions, and thus it is necessary to look further, to our expressed policies, and to judicial statements, to ascertain the limits on SCC services.

34. The foremost pronouncement of our policy regarding the role of Specialized Common carriers in domestic communications is the *First Report and Order* in Docket 18920, *supra*, (the *Specialized Common Carrier* decision). We have never modified this policy, but rather have reaffirmed our findings therein on several occasions,[3] and therefore they are controlling on the issues in the case.

35. At the time of the *Specialized Common Carrier* decision, we had before us 1713 microwave applications from 33 applicants, 17 of which were affiliated with MCI. Accordingly, the statements of MCI as to the types of services it proposed to offer were of importance in the

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[3] See, *e.g.*, Docket No. 19117, 39 FCC 2d 131, 133; *AT&T* (Hi-Lo), 58 FCC 2d 362, 366 (1976); *Bell System Tariff Offerings*, 46 FCC 2d 413, 424-25 (1974).

policy determination made therein and are helpful in ascertaining the limits, if any, imposed upon Specialized Common Carrier (SCC) service offerings. The MCI applications considered were for "portions of a proposed nationwide network to provide specialized *private line* communications services" (emphasis added) 29 FCC 2d at 874. We further quoted MCI's pleadings that "the real distinction which delineates MCI service from anything provided today by existing common carriers is not the facility itself but the manner in which a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability" 29 FCC 2d at 875. Finally MCI asserted that there was a distinct difference between a public telephone service which is a natural monopoly and a customized communications service offered on a private line basis, *Id.* Thus, MCI sought therein to offer only private line, point-to-point services. Later, in discussing the impact of the specialized services being proposed upon existing carriers, we indicated (29 FCC 2d at 907):

> MCI's proposed "customized" or "individually tailored" private line services purport to offer customers the flexibility and benefits of private microwave at lower cost to the user, *e.g.*, the exact bandwidth required for any particular service, any bandwidth that is required, and flexibility in the use of channels and customer terminal equipment.

36. Our discussion in the *Specialized Common Carrier* decision makes it quite clear that we intended and did open competition only in the limited portion of AT&T's and Western Union's business represented by private line services. For example, our analysis of possible revenue diversion (29 FCC 2d at 911-914) dealt only with the private line revenues of these two carriers. Further, we recognized that SCCs would not compete directly with the established carriers' message services.

"There is no reason to believe that [nationwide average] pricing of the interstate message service offerings of the Bell System and Western Union (such as MTT, WATS, and public telegraph) need be altered by new entry into the developing specialized communications market. Clearly, none of the uniform rate structures of the existing carriers for such services would appear in jeopardy *since those services are not being challenged competitively to any substantial degree by the services proposed to be offered by the aspiring new entrants.*" 29 FCC 2d at 915 (emphasis added)

37. The Report and Order in Docket No. 18920 speaks both in terms of specialized and private line services. Although MCI and RCA Globcom contend herein that the term "specialized services" includes far more than just "private line," a reasonable and proper reading of our language equates the two. For example, in describing the applicants' proposed services, we characterize MCI's proposals as " 'customized' or 'individually tailored' private line service," while the subsequent discussion refers collectively to such proposals as "specialized services." 29 FCC 2d at 907. Finally, the market studies referred to therein all surveyed the potential demand for specialized private line services, and thus our estimates of the impact of the SCCs were predicated on direct competition for private line services only.

38. In a similar vein, we dealt with the contention that the new entrants would merely be duplicating the services then being offered by established carriers (29 FCC 2d at 906):

While there may be some overlap between the services proposed by the applicants and the present offerings of the established carriers, we find sufficient warrant for the staff's conclusion that the applicants are

seeking primarily to develop new services and markets, as well as to tap latent, but undeveloped submarkets for existing services, so that the effect of new entry may well be to expand the size of the total communications markets. To be sure, the established carriers now provide data transmission and private line services. However, the services proposed by the applicants have technical and service features significantly different from those of the established carriers.

39. This intention to limit SCC services to private line offerings was also recognized by the United States Court of Appeals for the Ninth Circuit. In upholding the Commission's *Specialized Common Carrier* decision, *sub nom Washington Utilities and Transportation Commission* v. *FCC*, 513 F.2d 1142, 1159 (1975), *cert. denied*, 423 U.S. 836 (1975), the Court stated:

> The business involved is that of providing *specialized private or leased line communications services* through microwave transmission facilities, *as distinguished from public exchange and long distance toll telephone service.* [emphasis added]

40. Similarly, the United States Court of Appeals for the Third Circuit, in upholding the Commission's Decision in *Bell System Tariff Offerings*, Docket No. 19896, 46 FCC 2d 413 (1974), interpreted the *Specialized Common Carrier* decision as referring only to competition in private line services. *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250, 1260-1261 (1974):

> [W]e note that in assessing the extent to which the established carriers' revenues might be diverted by competition from the specialized carriers, the FCC focused upon the *total* revenues earned by the established carriers in private line services. We find this

focus to be significant. Implicit in the FCC's evaluation is the assumption that the new entrants will provide services similar to those provided by established carriers within the rubric of "private line services." [emphasis in the original, footnote deleted].

41. Finally, MCI itself, in pleadings before the United States Supreme Court,[4] and the District of Columbia Circuit[5] and the Third Circuit[6] U.S. Courts of Appeals, interpreted the Docket 18920 Report and Order as limiting SCCs to the offering of private line services. (Relevant portions of these briefs appear in Appendix C.) For example, in its Supreme Court brief, *supra* note 4, MCI asserted:

> (3) The Commission's directive that it contemplated "full and fair competition in the specialized field among all carriers, both established and new . . ." indicates that the Commission intended to authorize the new carriers to provide all elements of the private line services then being furnished by the established carriers, rather than an incomplete "package" of private line services. The Commission's finding that the provision of interstate private line service should be on a full, fair and non-discriminatory basis would be meaningless without the provision of the full range of private line services. (503 F.2d at 1261-62, Pet. App. 22a).
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> (4) The narrow interpretation sought by petitioners here would frustrate the basic objectives enunciated

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[4] Brief for Respondent, *American Telephone and Telegraph Company* v. *FCC*, No. 74-1229, May, 1975, pp. 24-25.

[5] Brief for Intervenor, *AT&T* v. *FCC*, No. 74-1953, April, 1975, pp. 2 (n. 1), 17-19, 37.

[6] Brief for Intervenors, *Bell Telephone Company of Pennsylvania* v. *FCC*, No. 74-1386, May 28, 1974, pp. 37-40, 52-54.

in the Docket No. 18920 proceeding, in which the Commission repeatedly used the generic term "private line service," which put AT&T on notice that it would be expected to provide interconnections for the full range of such services. The denial of interconnection facilities for the specialized common carriers similar to those provided to AT&T's "affiliated carrier," the Long Lines Department, would place them at a definite disadvantage in obtaining customers and frustrate the Commission's objectives in authorizing entry by the specialized carriers. (Footnote omitted).

42. MCI also interpreted Docket 18920 as limiting the specialized carriers to private line services in filings before this Commission. For example, in its brief filed in Docket 19896, *supra*, in discussing whether we intended competition to extend to foreign exchange (FX) and common control switching arrangement (CCSA) services, MCI asserted that these were private line services within the meaning of the *Specialized Common Carrier* decision (pp. 46-47):

> Any other conclusion would completely frustrate the entire purpose of Docket No. 18920 . . . The Commission knew that if the new carriers were ever to become viable and offer innovation services they would need to share the private line market already being serviced by AT&T and Western Union. Since the Order discussed Bell's total private line market and revenues throughout, it is obvious that *everyone* was to be allowed to compete for *every service*—including FX and CCSA. The Commission now has the opportunity to stop once and for all the effort of AT&T to kill competition by setting up protected enclaves within the private line market from which it claims the right to exclude the specialized carriers on the ground that these services were not specifically

mentioned in the order in Docket No. 18920. [Emphasis in the original].

43. From this language, it is clear that this Commission, the reviewing courts and MCI itself believed SCC competition to be limited to private line services. Further, they felt that the message services of AT&T and Western Union, such as MTS, would not be subject to direct competition. Finally, the Courts, affirming our stated policy of open entry in this field, acted upon the expressed intention of the SCCs that they intended to offer only private line services.

b. *Docket No. 19117 and Section 21.705 of our Rules*

44. MCI makes the argument that our Report and Order in Docket No. 19117, *supra;* removed the restrictive conditions placed on its facility authorizations and permitted the SCCs to offer any communications services within the technical limitations of their facilities. It also asserts that Section 21.705 gives carriers the right to offer any communications service not specifically excluded by their authorization. Since Docket No. 19117 removed all such restrictive conditions, MCI alleges, it is not limited to private line or any other specific category of service.

45. While Section 21.705 expresses the truism that a carrier need not generally file an application for each new service it wishes to offer, it cannot be used to reverse a clearly defined Commission policy. The Rule states that a carrier may provide any service "provided for in the *legally applicable* tariffs of the carrier" (emphasis added). Any tariff which violates a statute or our Rules, Orders, or Policies is unlawful on its face. *Associated Press* v. *FCC,* 448 F.2d 1095 (D.C. Cir., 1971); see also *Press Wireless, Inc.* v. *FCC,* 264 F.2d 372 (D.C. Cir., 1959); *Nader* v. *FCC,* 520 F.2d 182 (D.C. Cir., 1975). Since, as discussed above, the *Specialized Common Carrier* decision

specified that the SCCs shall offer only private line services, any tariff which offers another service is unlawful on its face. Accordingly, such a tariff is not a "legally applicable tariff" within the meaning of Section 21.705. MCI's rather circular argument, that a tariff which may be otherwise unlawful is made lawful because of 21.705, cannot stand. If a tariff is unlawful because of our policies or orders, it cannot be made lawful by Section 21.705.

46. Similarly, our Report and Order in Docket No. 19117 removed specific conditions which had been imposed in authorizations on the services domestic carriers may offer. MCI asserts that this action removed all restrictions on all such carriers' authorized services, so that no tariff can be rejected as offering unauthorized services. A reading of the Docket 19117 Report and Order shows that this clearly was not our intention. The rulemaking in that Docket was instituted to determine if certain restrictive conditions placed upon facility authorizations of AT&T and the Pioneer-United Telephone Company should be removed. These conditions required the carriers to utilize the authorized facilities only for existing or specified services unless further authorizations were obtained. They were imposed initially "to provide reasonable opportunity for the competitive development of the market for specialized communications services." It was our concern that "this objective could be thwarted by existing carriers who were in a position to institute new offerings for such services simply by filing tariffs, without any prior Commission approval, while at the same time impeding or delaying the entry of new carriers seeking to serve that market by raising various policy objections to the applications of the new entrants for authorization of facilities to provide service." 39 FCC 2d at 133.

47. By the time of the Report and Order, however, we had adopted the *Specialized Common Carrier* decision and the Second Report and Order in Docket No. 16495, *Do-*

mestic Satellites, 35 FCC 2d 844 (1972), which, *inter alia*, opened the domestic satellite field to competition. Because the policy determinations made in these orders negated the need for imposing specific conditions of this type on the authorizations, we terminated the rulemaking and declared such conditions on the authorizations for domestic facilities of all carriers null and void.

48. While the Docket 19117 Order specifically removed these conditions, it did not in any way modify or reverse our policies regarding the types of services the specialized carriers may offer. Rather it was *because* of the Docket 18920 decision, and because of the presence of competition *for certain services*, that 19117 was decided the way it was. Accordingly, MCI's position that the Docket No. 19117 Order removed all restrictions on the services it can offer is entirely without foundation, and MCI remains limited to the offering of private line services.

49. If we had intended to reverse the Specialized Carrier decision, *i.e.*, to allow a specialized carrier to initiate non-private line service simply through the filing of a tariff revision, the Docket No. 19117 proceeding would clearly not have been the proper forum. The Notice of Proposed Rulemaking therein was narrow in scope, not all the active parties to Docket No. 18920 were parties, and the Report and Order focused only on the necessity of retaining conditions placed on certain domestic facility authorizations. Such a proceeding was certainly not a reasonable place to reverse a policy which had been developed less than two years earlier after an extensive investigation. Further, we certainly would have made it explicit that we intended to reverse such a major policy.

50. In addition, there is no indication prior to the present proceeding that MCI interpreted the Report and Order in Docket No. 19117 in such a way as to reverse the

Specialized Carrier decision. All the statements in MCI pleadings cited above were filed *after* the Docket 19117 Report and Order was released and in no way indicated that MCI believed the *Specialized Carrier* decision to have been modified—no reference was made in those pleadings to Docket No. 19117. As late as May, 1975, MCI told the Supreme Court that it was limited to offering private line services,[7] and no Commission Order since that date has modified that limitation. Even in the present proceeding, in its Motion for Inquiry into Public Interest Considerations regarding establishment of a communications monopoly, filed on May 20, 1976, MCI refers (at p. 41) to the "limited areas of communications which the Commission has opened to competition." Thus, despite its allegations in pleadings that Docket 19117 and Section 21.705 removed all restrictions on the types of service MCI may offer, its most recent pleading appears to take the opposite position. Finally, in its oral argument before us, in response to a question about whether MCI has always, both before the Commission and the Courts, described its services as private line, counsel responded, "I think the phrase has been used. It's loosely descriptive of what MCI initially proposed to do" (Tr. 97). In fact, MCI, prior to the present proceeding, has always told the Commission that it intended to offer exclusively private line services.

51. Both the *Washington Utilities* and *Bell Telephone of Pennsylvania* decisions, *supra,* were rendered well after the Docket 19117 Report and Order, and both upheld the view that the SCCs are limited to private line services. Finally, several Commission decisions rendered since 1973 have reaffirmed the Docket 18920 philosophy (supra, note 3). Accordingly, until the present proceeding there was no indication that the Courts, the Commission

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[7] *AT&T, supra* note 4.

or even MCI itself felt that the Docket No. 19117 Report and Order, which was decided more than three years ago, modified or reversed the policies established in Docket 18920. MCI is therefore advocating a position completely different from that which it had advocated at every previous opportunity, including in its own applications for grants of operating authority.

c. *Is Execunet a Private Line or Message Telecommunications Service?*

52. The July 2 Order contained an analysis of the characteristics of Execunet. The conclusion reached at that time was that Execunet was essentially MTS, not a private line service. MCI has contested this conclusion by listing a number of specific alleged differences between Execunet and AT&T's MTS offering, and similarities between Execunet and private line service.

53. Since MCI had asserted, prior to the July 2 Order, that Execunet had most of the characteristics of foreign exchange (FX) private line service, we addressed what we found to be the differences between the two services (Page 4):

> First, FX is specifically excluded from the joint use provision (3.1.5.) of Tariff 260, while the inter-city facilities used for Execunet are shared by all users of the service. Second, FX is available to access one distant exchange area toll free, from the customer's premises in the calling city, while Execunet can be assessed directly from any push-button telephone (or from any telephone, using a separate tone generator) in the calling city to call any telephone in any one of a number of distant cities but always at a toll charge. Third, an FX customer uses dedicated facilities from his location to the distant telephone company exchange office, and these facilities are available at all

times, while the Execunet customer uses common local exchange plant at both ends, connected by intercity facilities which are not dedicated to any specific customer but are shared by a number of customers. Fourth, the FX customer is billed a periodic charge for the FX line, calculated on a mileage basis, plus a monthly local service charge at the distant location, while the Execunet customer is billed for each call, based upon time and distance, subject to a monthly minimum, with no charge added at the distant city.

54. MCI challenges each part of this analysis, then states that Execunet is not identical to FX or any other private line service but is rather an entirely new communications service which is not MTS. It contends that Execunet is a variation of a hypothetical service which MCI terms "shared FX." Since our *Resale and Shared Use* inquiry, Docket No. 20097, had not determined whether or not FX should or may be resold or shared, MCI asserts that Execunet cannot be found unlawful merely because it is shared FX service.

55. MCI lists a number of alleged similarities between FX (both "shared" and fulltime) and Execunet, as well as alleged differences between MTS and Execunet. These are listed and discussed in detail in Appendix A. In general, most of the items listed as similarities with FX are also characteristics of MTS, WATS, or both,[8] and thus they are by no means unique characteristics of FX or any other private line service. Certain of the listed items represent very minor differences in billing procedures, minimum contract period and time-of-day pricing which are not essential characteristics of basic MTS or WATS offerings and which are clearly insufficient to cause Exe-

[8] WATS, like MTS, is not subject to competition, pursuant to the *Specialized Common Carrier* decision, 29 FCC 2d at 911.

cunet to be ruled a completely different service from MTS or WATS.

56. By the same token, the specific characteristics of MTS which MCI cites as not present in Execunet are, for the most part, not essential to MTS but are rather convenience features, many added to the tariffs in recent years, which are not elements of the basic station-to-station dial MTS offering. If features such as person-to-person, collect, credit card and conference call services were eliminated from Bell's tariff, the service would still remain MTS, and the large majority of calls placed would be unaffected. Similarly, see-while-you-talk (Picturephone) and 50 kilobit switched services are specialized, add-on services to the MTS network. As the item-by-item analysis in the Appendix demonstrates, the remaining differences cited by MCI either are not factually correct or are so insignificant that they in no way could reasonably be deemed functional distinctions between the services.

57. Rather than "proving" that Execunet is a private line service and functionally different from MTS, as MCI asserts, analysis of MCI's list demonstrates that Execunet has many characteristics similar to those of MTS or WATS and that many of the alleged similarities with private line service are similarities only with a hypothetical service, presently being offered by no carrier, with characteristics shared in common with non-competitive services.

58. Execunet and MTS are both accessible from any telephone in the calling city and can access any telephone in a number of called cities. Both employ the same local exchange telephone network used in common by the general public in order to enter the inter-city segment of the service offering,* and both involve the indiscriminate

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* While the subscriber *may* secure a separated dedicated local loop for this service he need not do so if he subscribes to local exchange

sharing of inter-city facilities by all subscribers. Inter-city facilities for MTS and Execunet are available on demand, and both MTS and Execunet are charged on a usage-sensitive basis. Finally, neither service terminates in specifically designated customer premises or local exchange switching centers.

59. Prior to the present proceeding, there had been no confusion or debate over the meaning of private line service. The Ninth Circuit U.S. Court of Appeals, in upholding the *Specialized Common Carrier* decision (*Washington Utilities, supra,* para. 39) defined private line service by distinguishing it from "public exchange and long distance toll telephone service." 513 F.2d at 1155. This is the crucial distinction. Private line service, in its most obvious meaning has the distinction of being private or dedicated, *i.e.*, not provided to the general public.[10]

60. In order that this logical distinction can have any validity in practice, however, the private line service must be provided via facilities which are in some significant respect dedicated to the *private* use of the customer and not used or useable for public communications services. While more than one private line service or customer might properly share the use of any facilities used in providing the service(s), for purposes of efficiency, the use in common of facilities employed for service offerings to the general public does not fit within the concept of a private line service. Similarly, while private line service may properly include service to more than a single distant

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telephone service. Counsel for MCI admitted at oral argument that no customer of Execunet has taken a dedicated local loop and anticipated that the great majority of customers would not take such a dedicated channel (Tr. 9).

[10] Webster's New World Dictionary, College Edition, defines private (at pp. 1159-1160) as "of, belonging to, or concerning a particular person or group of persons, not common or general; . . . not open to, intended for, or controlled by the public."

location, on both a switched and nonswitched basis, these locations should be specific and discrete and must be designated by the customer.

61. Taking these factors into consideration, we believe the *sine qua non* of a private line service is that it (a) either originate or terminate at a specific location designated by the customer via a communications channel dedicated to his private use and not used or useable for public communications services; and (b) access only those distant locations (including if appropriate, distant telephone central offices) specifically designated by the customer [11] to meet his private communications needs.

62. While it appears unquestioned that the significant characteristics of a private line service are the dedicated channel and the designated distant termination, it is instructive to test this definition by describing several services which are generally understood to be classed as "private line." By listing only a few such services as we do not in any way wish to stifle the development and offering of innovative private line services by implying that such services are limited to those presently offered.

63. *Point-to-point private line service* is a term which denotes a *dedicated* or private local channel at each end, connecting the customer's premises to the carrier's local central office, and an interexchange channel (IXC) which connects the central offices. At the customer's premises, the local channel is connected with a telephone, private branch exchange (PBX), teletypewriter or other terminal equipment. The local channel at each end is dedicated solely to the private line service.

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[11] This does not preclude the customer from directly accessing more than one distant exchange or premises from a single dedicated local channel provided each such access location is specifically designated by the customer. This does not preclude certain interconnections to other services.

64. *Foreign exchange (FX) service* includes a dedicated local channel, as with point-to-point private line, at one end of the service (commonly referred to as the closed end), connected at the carrier's central office with an IXC which terminates in a central office in a distant local exchange (the open end).[12] The customer at the closed end has non-toll access into the local exchange served by that distant central office. A telephone number of the distant local exchange is assigned to the FX service so that the FX customer may be accessed in the same manner as if he were situated within that local exchange.

65. *Common Control Switching Arrangement (CCSA) service* consists of a network of private lines, subscribed to by the customer, which are accessed through switches, located at the carrier's central office, via dedicated local lines. These lines terminate on the customer's premises in connections similar to those provided in connection with point-to-point private line service.

66. These typical existing private line services all have certain unifying characteristics which are necessary elements of all private line offerings. These are termination of the service (1) at one end by a local circuit dedicated to the specific private line service and not used or usable for exchange service within the customer's local exchange area, and (2) at the other end at premises designated by the customer or specifically designated local exchanges. Prior to the filing of Execunet, no tariff filing which purported to offer a private line service has contained characteristics which do not fit this definition, and until the present proceeding, all carriers and the Commission have recognized these as essential characteristics of private line services.

67. While a service having some characteristics in common with WATS or MTS could be found to be private

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[12] See *AT&T*, 56 FCC 2d 14, 20 (Note 5) (1975).

line, Execunet has all the essential characteristics of MTS or WATS. Similarly, Execunet does not have the essential characteristics of private line service and thus cannot be so classified. The most significant characteristic of Execunet which causes it to differ from all private line services is the fact that the local channel terminating at the customer's premise is not dedicated to that service but rather is utilized as well for local exchange service. As a result, the customer can directly access the service from any telephone, on or off his premises, (he can call any telephone in any of a number of distant cities), and more than one authorized user of his identification number can use the system simultaneously.

68. MCI further argues, however, that even if Execunet contains many of the characteristics of MTS, the public interest requires that we approve the service, since no other carrier is offering it and a need for this service allegedly exists. Since we conclude that Execunet has all the *essential* characteristics of MTS, and is thus indistinguishable from MTS, this argument is incorrect. But even if it were correct, the effect of accepting it would be to reverse the *Specialized Common Carrier* policy in this proceeding, without conducting the type of extensive investigation carried out in Docket No. 18920. The need for a service such as Execunet, if it existed, is not the only factor which would have to be considered. Rather, the impact on users of other services and other economic, legal and technical issues would have to be explored in a broad forum. The policies established in Docket 18920 cannot be eroded on an *ad hoc* basis but rather should be re-examined only upon a showing that a need exists for such review.

69. As noted above, MCI asserts that the revenue shift from other carriers to Execunet is minor and will have an insignificant impact on Bell or other established carriers. At the oral argument, however, counsel from

USITA and Continental averred that the potential impact of Execunet on their portions of interstate revenues was substantial and could cause increases in local telephone service. Since we have found that Execunet is outside of MCI's authorizations, and since the evidence before us on economic impact is little more than unsupported allegations, we need not reach this question in this proceeding.

E. *Procedural Arguments*

a. *Notice and Hearing Issues*

70. A principal issue MCI raises is whether our July 2nd action accorded MCI the procedural due process to which it was entitled. MCI argues it was denied notice of the investigation and of the impending adverse action, and a fair opportunity to respond to the arguments against Execunet.

71. MCI claims that the Chief, Common Carrier Bureau's referral of AT&T's complaint cannot constitute notice that we had instituted a proceeding with regard to Execunet. MCI points out that the Bureau's cover letter contained only a ten line request that MCI comment on AT&T's complaint. It contained no reference to possible consequences stemming from the referral and no notice that we were now investigating the lawfulness of Execunet service. MCI contends that the referral appeared only to be part of our routine procedure of referring informal complaints for a carrier's comment pursuant to Section 1.716 *et seq.* of the Rules. Under the Rules, MCI asserts informal complaints standing alone are not ripe for disposition. Moreover, according to MCI, we never provided it with the notice required by Section 4 of the Administrative Procedure Act. This section provides that a notice of rulemaking set forth a statement of the time, place and nature of a proceeding, reference to the rule proposed, and

the terms of substance of the proposed action or a description of the subject and issues involved. In this context MCI also asserts that our action failed to comply with the minimum standards for notice and hearing required by Sections 204 and 205 of the Communications Act. MCI states this requirement is not open to our discretion. On this basis, according to MCI, our rejection of Execunet deprived MCI of its right to a hearing.

72. Finally the July 2 *Order* is alleged to be defective since it contained no disclosure of the commencement or extent of the investigation. MCI acknowledges that the Commission staff met with MCI representatives more than ten times between the filing of its metered use tariff and the adoption of the July 2 Order. However, according to MCI, staff questions concerning the clarity of a tariff revision ranging over many months cannot be equated with notice that a service offered pursuant to that tariff is the subject of an investigation.[18]

73. MCI further argues that we failed to accord it specific notice that the investigation could lead to the rejection of the service. MCI argues that in cases where we are considering summary adverse action, we have a duty to first give notice that such action is contemplated. MCI contends that we provided no warning to MCI that its authority to offer Execunet was in jeopardy and deprived MCI of proper notice of its proposed disposition. According to MCI, we then denied any opportunity for redress by rejecting the service out of hand rather than designating formal proceedings pursuant to Section 204 or 205 of the Act.

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[18] We do not find here nor did we find in our July 2 letter that the staff meetings with MCI constituted notice. Those meetings, however, did reflect the staff's concerns about the scope of MCI's tariff. Thus, when AT&T presented its evidence, we were aware that MCI had not provided clarification of its tariff as it had promised. As a result, the meaning of its tariff remained unclear.

b. *Notice and Hearing Discussion*

74. Our review of the events leading to the July 2 Order convinces us that we fully complied with applicable statutory and due process requirements. Once we established that MCI lacked authority to provide Execunet service, we properly rejected Execunet. The characteristics of Execunet found in MCI's letter of June 5, 1975, clearly show that Execunet is not a private line service. The discussion of the substantive issues surrounding the Commission's treatment of Execunet, set forth elsewhere in our Order, show the absence, prior to the July 2 Order, of substantial and material issues of fact requiring a full scale evidentiary hearing.

75. Section 4(i) of the Communications Act provides that we are empowered to "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of (our) functions." The tariff rejection power is beyond dispute where the facts show that a tariff offering is patently in violation of a carrier's underlying authorization. In *Press Wireless, Inc.* v. *F.C.C.*, 264 F.2d 372 (1959), the United States Court of Appeals for the District of Columbia affirmed our rejection of a tariff purporting to extend the carrier's authority to provide a service not previously authorized. In our discussion of the *Press Wireless* offering, we stated:

> [Acceptance of the tariff] would mean that the Commission was transferring to the carrier we were charged with regulating the statutory duty imposed on us by Section 303(b) of the act to prescribe the service rendered by each class of stations . . . Under the Press Wireless theory the carrier would never have to file an application for modification of license but would file a modification of its tariff to provide any service it desired . . . Further, the criteria by

> which its application would be judged would be those in Sections 201-205 of the act, namely, "just and reasonable" rather than those of the public interest, convenience and necessity in Section 309 of the act. *Press Wireless, Inc.*, 25 F.C.C. 1466, 1468, 9 (1958).

Moreover, the Court in another case involving our power to reject a tariff declared:

> An agency has the power and in some areas the duty to reject a tariff that is demonstrably unlawful on its face. Thus, an agency will reject a tariff that conflicts with a statute, agency regulations or order, or with a rate fixed in a contract sanctioned by statute; similarly a tariff will be rejected if it is unlawful without prior agency approval and approval has not been obtained. In such cases the refusal of an agency to reject a tariff may be reviewed by the courts. *Associated Press* v. *F.C.C.*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

As was the case in *Press Wireless*, MCI was offering a service for which prior agency approval had not been obtained, and thus rejection of the tariff was an appropriate and necessary remedy.

76. At oral argument, however, MCI disputed that *Press Wireless* supported rejection of its tariff. Instead, MCI asserted that its authorizations are issued under Part 21 of our Rules, while those in *Press Wireless* were issued under Part 23. This distinction is without merit. The holding in *Press Wireless* that a carrier may not lawfully tariff a service for which it does not possess the underlying facility authorizations is statutory. As is evidenced by the *Press Wireless* decision, the *statute* requires the Commission to authorize the use of facilities for a service prior to its initiation. Thus in this instance MCI must obtain a new certificate pursuant to Section 214 of the Act, 47 USC 214, prior to offering a non-private line service.

Our authority to reject a tariff that violates a statute or any rule, policy or prescription of ours is well recognized. *Press Wireless, Inc.* v. *F.C.C., supra; Associated Press* v. *F.C.C., supra; Nader* v. *F.C.C.*, 520 F.2d 182 (D.C. Cir. 1975); *Mebane Home Telephone Company* 53 FCC 2d 473 (1975), *aff'd sub nom. Mebane Home Telephone Company* v. *F.C.C.*, Case No. 75-1616, D.C. Cir., decided April 30, 1976, petition for rehearing denied.

77. Further, we provided MCI with notice and opportunity consistent with Sections 204 and 205 of the Communications Act and Section 4 of the Administrative Procedure Act. MCI was informed by letter of May 21, 1975, that we were considering allegations filed by AT&T concerning MCI's authority to offer Execunet. The statutory provisions were met when we informed MCI that it should file with us its comments responding to AT&T's allegations. A copy of AT&T's letter setting out specific arguments addressing the various elements of Execunet and stating that AT&T could not find that Execunet fell within MCI's limited authorization to provide private line service was enclosed. The cover letter stated that AT&T alleged that "your Execunet service is not properly tariffed with this Commission, and that the service constitutes the provision of long distance message telephone service which MCI is not authorized to provide." It then requested MCI to "reply" to us concerning this matter within 15 days. The cover letter certainly provided MCI with notice, as required by Section 4 of the APA, of the time, place and nature of the proceedings. Moreover, its reference to AT&T's allegations that Execunet was improperly tariffed and constituted unauthorized provision of MTS provided MCI with notice of the subject of the proceeding and the issues involved. If that was insufficient for MCI to understand the scope of the proceeding, AT&T's attached complaint spelled out the issues. AT&T stated:

> Execunet service is simply long distance message telephone service. MCI never has sought authority to enter the long distance message telephone business (in fact, it has said it did not intend to provide long distance toll service). The Commission has granted MCI authority only to provide private line services and the Court of Appeals, in affirming the Commission decision, has recognized these facts.

In requesting our intervention, AT&T asked that we:

> take appropriate enforcement action to *stop* the unauthorized Execunet service . . . [*P*]*rompt Commission action* would minimize the disruption, inconvenience and economic waste affecting our customers, MCI and MCI's customers. [Emphasis added]

No reasonable person at that point could not have understood the issue being raised nor the relief being requested. This referral commenced the record upon which we based our July 2 Order.

78. MCI's own statements show that it took full advantage of its opportunity to justify the lawfulness of Execunet, and that it considered that opportunity adequate. Indeed, MCI's letter of June 5, 1975 responds to the merits of AT&T's allegations by arguing that Execunet was a private line service comparable to other private line services then offered. The MCI reply of June 5 even sets forth a summary of the issues AT&T has sought out in its complaint. MCI considered the issues to be that it was "through its Execunet service offering interstate long distance message telephone service and that it had not been authorized to provide this service and has not properly tariffed it with the Commission." It then provided a six page rebuttal of AT&T's allegations. In its conclusion, MCI stated that AT&T's complaint was insufficient "to justify or require any Commission action with respect

to MCI's Execunet service." In its second letter filed June 9, MCI declared that its letter of June 5 responded "competently and completely" to AT&T's objections regarding Execunet. Thus MCI's own statements show that it had adequate notice of the issues involved and adequate opportunity to address the merits.

79. Even assuming *arguendo* that MCI was denied adequate notice and opportunity for hearing in the first instance, the instant proceeding fully complies with statutory and due process requirements. First, the July 2nd Order provides notice of the issues respecting the Execunet offering. The Order thoroughly presents the Commission's analysis of the substantive issues surrounding the lawfulness of the Execunet offering. Second, the July 2 Order unequivocally notifies MCI that we have determined that rejection of the Execunet offering is an appropriate remedy if we find that the service is unlawful. Third, the December 3 Order provided an opportunity for hearing by calling for a two stage submission of pleadings and stating that further proceedings will be held if appropriate. When we found that oral argument would be appropriate, we set forth six questions to guide the parties in preparing their arguments. Fourth, in response to a motion by MCI and out of an abundance of caution, in an Order released May 17, 1976, FCC 76-442, we reiterated the legal basis for this proceeding. Fifth, we have concluded, after a thorough analysis of the record, that no substantial and material fact which might necessitate a trial-type hearing remains unresolved. See paragraphs 9-69 and Appendix A. Sixth, since there have been no improper presentations following the filing of AT&T's letter, MCI cannot allege that this remand proceeding was in any way tainted by the undue influence of any party.

F. *Ex Parte Arguments*

80. In its motions filed December 15, 1975, MCI requests a special evidentiary hearing to contest AT&T's off-the-record arguments, to cross-examine representatives of AT&T who presented these arguments, and to submit evidence to correct our understanding of Execunet. MCI contends that AT&T's informal complaint filed May 19, 1975, was the culmination of AT&T's "preconceived, fully implemented persuasive plan" to persuade us that MCI lacked authority to offer Execunet, and not the initial step in a proceeding concerning MCI's authority to offer its Execunet service. According to MCI, the fact that the July 2nd Order acknowledges the lobbying efforts by AT&T represents clear evidence that AT&T improperly advanced its arguments. That acknowledgment, according to MCI, was insufficient to overcome the prejudicial effect of AT&T's overtures. MCI stresses that its letters of June 9 and July 1 informed us of the apparent breadth of AT&T's activities and sought additional information regarding AT&T's off-the-record allegations to enable MCI to rebut AT&T's statements. Instead, MCI charges, we chose to ignore these demands for a fair proceeding and to order MCI to discontinue Execunet service without ever responding directly to MCI's assertions. While not alleging a specific rule violation, MCI argues that AT&T's attempt to frustrate our decision-making process so tainted our handling of the Execunet matter that a special evidentiary proceeding is required to cleanse the record. According to MCI, only when the extent of AT&T's presentations is known and the tainted record cleansed, may we again deliberate the merits of the Execunet controversy. On a broader scale, MCI argues that the presence of prior contacts in so crucial a proceeding may raise doubts in the public mind concerning the integrity of our decision making process.

81. Pursuant to Section 5 of the Administrative Procedure Act, in an adjudicatory proceeding only the evidence contained in the official record and facts subject to official notice may be considered. According to MCI, unlike routine tariff matters our determination that Execunet was not a private line service, was essentially an adjudication of a particular set of facts involving a valuable privilege, not a rulemaking in the sense that the Commission resolution was applicable to numerous parties.[14] In accepting off-the-record presentations in the Execunet proceeding, MCI contends we violated the statute by considering evidence not on the record and not available for MCI to contest.

82. MCI also argues that we have failed to comply with judicial precedent setting forth applicable standards of agency conduct in guarding against improper presentations. MCI argues that no real difference exists between the July 2nd Order and those cases where the Courts have required special evidentiary hearings to cleanse the record of improper *ex parte* contacts concerning awards of television licenses. MCI states that the privilege of providing MTS to the public is at least as valuable as a television broadcast license award at issue in an adjudicatory proceeding and should be accorded the procedural protections extended by statute to traditional adjudicatory proceedings. MCI points out that in instances where a court has discovered that television broadcast awards were obtained

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[14] The fact is that our ruling in this case has broad applicability and impacts on many other carriers. The broad applicability of our ruling is recognized not only by the other parties including other specialized common carriers who have participated in this proceeding seeking to limit its broad scope but by MCI itself. On May 20, 1976, MCI filed a motion asking that we begin a proceeding determining the outer boundaries of MTS vis-a-vis private line service which we treat *infra*. Further, MCI itself points to Section 4 of the APA, a section dealing with rulemaking, for its notice rights.

in proceedings in which allegedly prohibited *ex parte* contacts occurred, we have held, pursuant to the direction of the court or on our accord, a special evidentiary hearing to determine whether improper contacts took place. In *WKAT, INC.*, 258 F.2d 418 (D.C. Cir. 1958) the court remanded a proceeding for a special evidentiary hearing concerning allegations that in a comparative hearing for a television broadcast station construction permit, persons with financial and other ties to a Commissioner exerted improper influence after a hearing examiner had rendered his decision and while final disposition was being considered by us. Likewise, in *Massachusetts Bay Telecaster, Inc.*, 261 F.2d 55 (D.C. Cir. 1958), we considered on remand allegations of improper *ex parte* contacts made after competing mutually exclusive applications had been filed.

83. Moreover, MCI argues that the courts have imposed this standard in rulemaking proceedings involving issues similar to those in Execunet. In *Sangamon Valley Television Corporation* v. *U.S.*, 269 F.2d 221 (1959), the court remanded a rulemaking proceeding for a special evidentiary proceeding when faced with clear evidence of improper presentations during our final deliberations and after the record had been closed. *Sangamon Valley* concerned the allocation of a television channel to one of a number of communities. Unlike the award of a television license, which is adjudicatory, a proceeding concerning channel allocation is rulemaking since the outcome determines the community to be served by the channel rather than the licensee of the station. The court found, however, that the channel allocation proceeding had significant bearing on the ultimate choice of licensee. Thus the court held that *ex parte* contacts between the parties and Commission decision making personnel after the comment period had closed violated fundamental fairness. In remanding the case for a special evidentiary hearing to

determine whether *ex parte* presentation had occurred the court declared:

> The Commission and the intervenor contend that because the proceeding now on review was "rule-making," *ex parte* attempts to influence the Commission did not invalidate it. The Department urges that whatever the proceeding may be called it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open. We agree with the Department of Justice. Accordingly, the private approaches to the members of the Commission vitiated its action and the proceeding must be reopened.

MCI argues in the instant case that the proceeding constituted a determination of the award of a valuable privilege: AT&T's monopoly over MTS. Since our finding declared Execunet to be essentially MTS, according to MCI, the proceeding resolved a conflict concerning the award of a valuable privilege. As a result, MCI contends it was entitled to the same treatment in the Execunet proceeding that the court directed in *Sangamon*.

84. MCI next points out that we, on our own accord, have taken remedial action when considering allegations concerning the provision of common carrier service. In *California Water and Telephone Co.*, 7 FCC 2d 571 (1967), we had before us a request for a cease and desist order to be directed against certain AT&T operating companies. Upon notification of allegedly improper contacts between decision-makers and other members of our staff, we informally investigated and concluded that *ex parte* rules applied to that part of the case considering the need for 214 authorization. To preclude possible reliance upon a defective record, we severed that part of

the case concerning the issue of 214 authorizations. As in *California Water and Telephone Co.*, MCI contends that the question of lawful operation of Execunet is essentially related authorization pursuant to Section 214 and MCI should have been accorded the treatment the Commission took therein.

G. *Ex Parte Analysis*

85. Section 1.1201 *et seq.* of the Rules sets out the rules relating to *ex parte* presentations in adjudicatory and rulemaking proceedings. Section 1.1207 provides that tariff proceedings pursuant to Section 204 and 205 of the Act are restricted rulemaking proceedings "from the day they are instituted." [15] As such Commissioners and their staffs and the Chief of the Common Carrier Bureau and his staff are prohibited from receiving any oral or written communications going to the merits of the proceeding by any interested person without notice to the parties to the proceeding once a tariff proceeding is designated for hearing. The reason for invoking the rules only when a tariff proceeding is initiated is that tariffs are often highly complicated and we have found that informal discussion in advance of a proceeding can quickly clarify issues which otherwise might burden our staff with unnecessary yet time-consuming investigation.

86. AT&T's affidavits state that it terminated its oral contacts with Commission personnel four days prior to filing its informal complaint. This is undisputed by MCI.

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[15] "Designated for hearing" was replaced by "from the day they are instituted" in Section 1.1207 of the Rules to remove any implication that only cases involving a full evidentiary hearing were subject to the *ex parte* rules. "From the day instituted" is intended to apply the *ex parte* rules to a case upon Commission action acknowledging that a case is to be decided and prescribing procedures—i.e., hearing, or written comments, or oral argument, or a conference, etc.

Thus, it cannot be said that AT&T violated the rules for no proceeding existed when AT&T urged us to act on Execunet on our own accord. Nevertheless, MCI alleges that lobbying before the filing of the complaint pursuaded us to prejudice the case. In support of this contention, MCI relies heavily on court decisions concerning invalid awards of television licenses. In *WKAT, INC., supra,* and *Massachusetts Bay Telecasters, supra,* the courts remanded television licensing proceedings to us for a determination of whether *ex parte* contacts had rendered a license awards invalid. In *WKAT, INC., ex parte* contacts had taken place *after* the case was set for hearing and during the decision making stage of the proceeding. Contacts such as these are contrary to Section 409(c)(1) of the Communications Act. This section provides that:

> In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or to the Commission, or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under Section 5(d)(l), unless upon notice and opportunity for all parties to participate.

Unlike the award of television licenses, however, tariff proceedings are rulemaking and not adjudicatory. Thus the case law of licensing proceedings and the mandate of Section 409(c)(1) are not directly applicable to Execunet.

87. In *Sangamon Valley, supra,* the court found strong evidence of improper *ex parte* contacts requiring a special

evidentiary proceeding intended to purge the impropriety from the proceedings. In reaching its decision the court determined that the rationale underlying the need for restricting *ex parte* contacts in adjudicatory matters applied equally to rulemaking involving "conflicting private claims to a valuable privilege." While the court in *Sangamon Valley* broadened the scope of *ex parte* prohibitions by insisting on their application in certain proceedings which were labelled as rulemaking, that case concerned prohibited contacts taking place during the record phase of a proceeding. Subsequent to *Sangamon Valley*, we have adopted rules restricting contacts, inter alia, prohibiting contacts between the public and Commission personnel in rulemaking matters after the institution of a proceeding. See footnote, p. 34.

88. In *California Water and Telephone Company, supra,* involving the provision of allegedly unauthorized service by AT&T affiliates, we ordered that issues involving 214 authorizations be severed from the proceeding when we found, after an informal investigation, that unauthorized *ex parte* presentations had been made to decision making personnel. There, the prohibited contacts had occurred *after* designation for hearing, and during the course of an adjudicative cease and desist proceeding.

89. A factor distinguishing the July 2 proceeding from each of the above decisions is that in the Execunet controversy the presentation by AT&T occurred *before* formal proceedings began. In fact, those contacts terminated before AT&T filed its informal complaint. Another factor distinguishing this proceeding from the cases cited by MCI is that the July 2 Order did not deal with a privilege to be necessarily granted to only one of several applicants having comparable rights and claims. Since the privilege of providing MTS has been reserved to telephone carriers pursuant to prior policy decisions including the *Specialized Carrier* decision under which MCI's own authorizations

arise, there were no mutually exclusive applications at issue. Rather we were dealing with the question concerning the scope of MCI's authorization. The question was therefore whether Execunet was a service lawfully offered pursuant to its tariff. The Commission found simply that MCI's authority to provide private line service did not authorize it to provide Execunet. It was our *Specialized Carrier* decision and not the July 2 Order which considered the award of a valuable privilege. There we extended to MCI and other carriers the privilege of providing *private line* services. Accordingly, MCI's argument that our July 2 Order disposed of competing claims to a valuable privilege is meritless since MCI lacked the scope of authorization necessary to be considered for the privilege it sought, i.e., the tariffing of Execunet service.

90. The events leading to the filing of AT&T's complaint and our July 2nd *Order* show that AT&T acted legally, and that we acted within our authority in rejecting Execunet. Immediately after MCI filed its metered use tariff, meetings were held between our tariff staff and MCI for the purpose of clarifying the tariff. As a consequence, MCI filed a tariff revision providing clarification of one aspect of the tariff and also promised to file a glossary of clear tariff terms. Instead of filing the promised glossary, however, MCI delayed the filing by explaining that the scope of a modular service offering could not be readily set forth in writing. As a result, questions concerning the tariff were unresolved when MCI offered Execunet to the public.

91. AT&T brought its allegations directly to us upon its discovery of the kind of service MCI was providing under the tariff. According to its affidavits, AT&T made its complaints orally in the belief that we had a duty to act of our own accord after being presented with a description of the Execunet service. The Bureau Staff, however, told AT&T that it should set out its allegations in writing.

92. The evidence developed by the pleadings and affidavits show that AT&T's contacts prior to the July 2 order were within legal bounds. MCI has not alleged that AT&T's representatives had financial or other links to the Commission personnel it contacted nor does MCI dispute the Commission's authority to act on its own accord in this matter. Instead, MCI alleged only that AT&T's "persuasive" presentations blinded the Commission to MCI's defense of its service. This argument is based on a misplaced understanding of the purpose of the *ex parte* rules. It is obvious that interested parties will conduct their arguments aggressively. The *ex parte* rules were not designed to prevent proper contacts, but to draw a line between proper and improper contact between decision makers and the public. In recognition of our responsibility to be informed about day-to-day developments in the communications industry, Congress and the Commission have generally permitted unilateral presentations in rulemaking matters before formal designation. MCI itself is also aware of the usefulness of informal exchanges with us. At page 5 of its July 1, 1975 letter, MCI agreed that "informal discussions between carriers and Commission personnel are desirable and often necessary." Indeed, MCI acknowldges at least 10 contacts with the Commission's tariff staff between the filing of its metered use tariff and the July 2nd Order.

93. MCI claims that AT&T's presentations amounted to a violation of the *ex parte* restrictions notwithstanding our forebearance in acting on the information supplied us and our staff reminder to AT&T that other procedures were available to press its claims. The regulations concerning restricted rulemakings reflect an intention to protect decision making personnel from off-the-record presentations by interested parties after a case is set for hearing. Here faced with an unauthorized incursion by a carrier into one of its authorized services, AT&T responded by demanding Commission action. As would be expected, it pursued its

interests vigorously. The staff, on the other hand, made clear that it would recommend no action to us based on AT&T's oral presentations.

94. In *Rules Governing Ex Parte Communications in Docket No. 15381*, 1 FCC 2d 49 (1965), we concluded that we would determine the fairness of off-the-record presentations falling outside the boundaries of our rules on a case-by-case basis. This proceeding involves allegedly unauthorized service by MCI. It does not involve the disposition of a mutually exclusive license application or the exclusive award of a valuable privilege. To exercise our various functions properly we must retain the flexibility of action. We must be free to initiate proceedings based on the kind of presentation and information AT&T presented here. While our staff for some time had awaited the clarification of MCI's tariff, the fact is that the allegations AT&T presented were of sufficient seriousness for us to initiate an inquiry. Accordingly, based on the facts of this case we cannot find that any violation of due process occurred, and thus we find no basis to hold a special evidentiary hearing concerning those presentations.

95. In the oral argument, MCI argues (Tr. 41) that the occurrence of off-the-record presentations prior to the filing of AT&T's May 1975 letter requires us to hold an evidentiary hearing to determine the impact of the presentation. In support MCI quoted the following language from *Rules Governing Ex Parte Communication in Hearing Proceedings, supra*, at paragraph 9:

> [I]t should be clear that presentations should not be made if the person making the presentation has knowledge of matters which will warrant the classification of the proceeding as a restricted proceeding . . . Ex parte presentations should not be made, for example, by a person who is planning to file a petition to deny or a mutually exclusive application, if the same presenta-

> tion would be prohibited after the petition or application has been filed.

The validity of that statement is unquestioned. MCI, however, misinterpreted the scope of Docket No. 15381.

96. We examined in Docket No. 15381 only presentations respecting adjudication or record rulemaking proceedings and we specifically pointed out at paragraph 8 that our rules should not be construed as prohibiting or authorizing off-the-record presentations going to the merits or outcome of a non-restricted proceeding. In this context, we have never declared that a complaint, as we interpret AT&T's letter to be, is automatically subject to the provisions of our rules respecting restricted proceedings. At paragraph 8 we stated that we would determine based on the facts of each particular case whether the public interest or due process require its designation as a restricted proceeding. To follow the course MCI now suggests would foreclose our efforts at informal adjustment of differences between members of the public and our licensees, and would bar members of the public from participating in proceedings. In essence the Commission could not entertain any oral complaints because of a fear that if the party was not satisfied with the oral discussion, it might invoke formal proceedings by a written complaint. Such a view of the *ex parte* restrictions would hardly serve the public interest. Clearly it was Congress' intent to make this Commission available to the public for complaint purposes on as broad a basis as reasonable. Any other interpretation would have the effect of limiting the Commission's ability to effectuate its Congressional mandate to police the industry efficiently.

97. In this case we were well aware that AT&T understood there were alternatives to its oral representations in calling our attention to MCI's Execunet service. But we did not believe that AT&T's oral representations of the facts as it saw them should preclude AT&T's further participation. Upon receipt of AT&T's letter containing its

allegations we immediately referred it to MCI as a vehicle to institute a proceeding concerning the lawfulness of Execunet. Indeed, we based our decision on MCI's reply to that letter. We have found, however, that it is through flexible responses to the problems of the public that we best serve the public. In this case our staff thought it best not to entertain AT&T's oral complaint. In other situations it may be adequate to entertain oral presentations. Whatever the case, it must be understood that a refusal to receive an oral presentation cannot be equated with a determination to treat a complaint as a restricted proceeding. Until a proceeding is restricted by us, we retain our flexibility to listen to off-the-record complaints concerning matters without our jurisdiction. Thus the contacts between AT&T and the Commissioners as well as Commission staff members, are legal because the *ex parte* rules had not attached. Even now we can find no basis supporting the argument that we should have foreclosed those conversations and imposed the restrictions in the *ex parte* rules from the time of AT&T's initial contact.

98. At oral argument (tr 41) MCI was asked what the Commission should do if the contacts were indeed improper. MCI responded that we should terminate the first proceeding,[16] have AT&T file a complaint and begin a second one and, in that second proceeding, place the burden of proof on AT&T to prove Execunet is not an authorized service. This proceeding in fact does basically that. Assuming *arguendo* that the July 2 proceeding was tainted, that proceeding was ended as MCI desires. No party has even alleged that this new proceeding is tainted. And certainly it grants MCI all its due process rights. The burden of proof, however, must remain with MCI. The burden of proof in a tariff proceeding, contrary to MCI's argument,

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[16] MCI's view is that there is no reason to discern the impact of the improper contacts because it is irrelevant—any improper contacts taint the entire proceeding.

is properly upon the proponent of the tariff. See Administrative Procedure Act, 5 U.S.C. 556(d). In an *Amendment of Part 61 of the Commission's Rules*, in Docket No. 18703, 40 FCC 2d 149 (1973), we stated that the purpose of placing the burden of proof pursuant to Section 556 on the carrier was to provide us with sufficient information to facilitate our judgment concerning the questions of a tariff's lawfulness. See *American Trucking Associations, Inc.* v. *F.C.C.*, 377 F.2d 121, 133 (D.C. Cir., 1966) cert. denied 386 U.S. 943 (1967); AT&T (Hi-Lo), 58 FCC 2d 362 (1976). Accordingly, the burden of proof must be on MCI since MCI has unique access to factual information necessary in resolving questions concerning the lawfulness of MCI's Execunet tariff. Thus, the instant proceeding, initiated pursuant to the Court's remand, offered MCI exactly the kind of review it has requested within a proper procedural framework.

H. *Outstanding Motions*

99. Several motions filed by MCI remain outstanding. Of those filed on December 15, 1975, we deferred ruling on all but one in our *Memorandum Opinion and Order*, 57 FCC 2d 666 (1976). We also deferred action on one of a series of motions filed on April 16, 1976 (*see Memorandum Opinion and Order* released May 17, 1976, FCC 76-442). Finally, as noted, MCI on May 20, 1976 filed a Motion for Inquiry into Public Interest Considerations Regarding Establishment of a Communications Monopoly (May 20 Motion). These motions are before us for ruling.

100. In regard to the December 15 motions, we dismissed as moot the Motion to Preserve Evidence, since AT&T had said it would not destroy any relevant material. In a second motion, MCI requested us to admit that we never informed MCI, prior to the filing of AT&T's May 19, 1975 letter, that we had any questions concerning MCI's authority to provide its Execunet service. While we will not

admit that the staff of our Common Carrier Bureau never informed MCI that it had questions regarding the lawfulness of the Execunet offering in the time period in question, we further believe that the issue is not relevant to our decision herein. Our findings that MCI was not denied due process and that AT&T's oral representations were not unlawful do not in any way turn on whether or not our staff had informed MCI that it was examining the lawfulness prior to the AT&T letter.

101. MCI also filed a motion to take deposition of Thomas W. Scandlyn, Assistant Vice President of AT&T. We believe such an examination is unnecessary. Mr. Scandlyn said in an affidavit that he had made certain representations to the Commission prior to May 15, 1975, and it is undisputed that such contacts ceased at that time. We have found that the contacts were not unlawful and did not, as MCI contends, prevent us from objectively examining the views of all the parties to these proceedings. We therefore believe it would be inappropriate for us to permit MCI to take a deposition of Mr. Scandlyn in this matter.

102. In its filings both of December 15 and of April 16, MCI requests us to initiate and conduct a special evidentiary hearing as to AT&T's "*ex parte* contacts with Commission personnel." We deferred ruling on those motions until we had heard oral argument and had fully examined the record. Upon examination of the entire record, as indicated herein, we have found that AT&T's representations, made prior to the filing of any opposition to MCI's tariff or to its Execunet offering, were not unlawful and did not prevent us from deciding the issues in this case objectively. We have further concluded that, assuming *arguendo* that Bell's contacts were unlawful, the present proceeding, initiated *ab initio* upon remand from the Court of Appeals, cured the improprieties. Accordingly, we deny MCI's motions and decline to hold the requested further proceedings.

103. We also have before us the May 20 motion. MCI asserts therein that we have never determined to what extent, if any, AT&T is granted a monopoly over certain interstate telecommunications services. It requests that we institute a general inquiry to determine those areas which the public interest requires to be a monopoly and those which should be open to competition. Finally, MCI asks us to hold the present proceeding in abeyance until such a further investigation is completed.

104. MCI proposes seven specific issues to be explored in this proposed investigation:

1. Is there any communications service that should be preserved as a monopoly for AT&T and its telephone company partners and that other carriers should be precluded from providing?
2. Specifically, should other carriers be precluded from providing MTS service?
3. If so, what is a precise definition of MTS?
4. Should the Commission's decision in Docket No. 19117 be reopened and revised so that all carriers would be required to obtain prior authorization from the Commission before offering new services?
5. If Bell is to receive legal sanction of a monpoly over certain services, what steps can and should the Commission take to prevent Bell from so structuring and pricing its monopoly services so as to undercut the competitive services of other carriers? Should the Commission require Bell to spin-off its competitive services to a separate, unaffiliated company?
6. Would the dangers of cross-subsidization of competitive services be reduced if Bell were *not* given a monopoly over any service, in the expectation that it would be inhibited from significantly inflating the

rates of such a service for fear that such a course would invite competition for that market also?

7. Is there an overriding public interest in permitting all carriers to innovate and to offer new services freely and without artificial restraint?

105. In support of its petition, MCI cites certain recent tariff amendments and other proposed services which, it asserts, are highly cross-elastic with each other and with Message Telecommunications Service (MTS) and allegedly contain elements which are similar to Execunet. These, MCI contends, should be taken into consideration when drawing any line between monopoly and competitive services.

106. AT&T has responded in part to this petition by disagreeing with MCI's characterization of recent amendments to AT&T's Private Line Tariff, FCC No. 260, and Western Union Telegraph Company's (Western Union) Hot Line service offering in its Tariff FCC No. 254. AT&T attaches a letter from Western Union dated May 18, 1976, explaining the Hot Line tariff amendments.

107. At the outset, we disagree with MCI that we have never defined the areas of telecommunications service which should be open to competition and those which are a monopoly. Rather, that was the principal purpose of our investigation in Docket No. 18920, *Specialized Common Carriers*. In the *First Report and Order* in that proceeding, 29 FCC 2d 870 (1971), *aff'd sub nom Washington Utilities and Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir., 1975), *cert. denied*, 423 U.S. 836 (1975) (*Specialized Common Carrier* decision) we authorized MCI and other specialized carriers to offer services in competition to AT&T and other established carriers only in the private line telecommunications field.

108. We have discussed at length (paras. 33-43), the limitations placed upon specialized carriers' authorized service. We also recognized in the *Specialized Common Carrier* decision that the existing services of AT&T and Western Union, primarily MTS and Public Message Telegraph Service, were not being made subject to competition by the newly emerging carriers (*supra,* para. 36). Further, as indicated above, we considered potential impact of competition on AT&T and Western Union in light of our policy that the specialized carriers would be offering only private line services and would not divert revenues from other services of the established carriers (29 FCC 2d at 910-14).

109. In essence, MCI is therein asking us to reopen the *Specialized Common Carrier* decision to determine again what services should be open to competition. We decline to do so. The changed circumstances MCI cites for such an inquiry are new filed or proposed service offerings of established and other competing carriers. There is no allegation that the public interest considerations upon which the *Specialized Common Carrier* decision were based have changed at all, nor that the economic character of the communications industry has changed so drastically that we should re-examine the industry structure.[17]

110. Of the specific services which MCI cites in its Motion, those proposed by Satellite Business Systems and IT&T do not exist and have never been filed as tariff offerings. Rather, we have received facility applications from both carriers, and these applications are presently under review. As to those offered by AT&T and Western Union, we disagree with MCI's characterization of them. We agree with Western Union's characterization in its letter to AT&T that its Hot Line offering is not a dial-

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[17] We are presently examining the economic impact of competition on the industry in our Docket No. 20003.

up service, but rather is strictly point-to-point. The user does not have access to the general public in a distant city, as MCI asserts, but rather can reach a specified distant premises which is not a telephone company central office. There is therefore, unlike Execunet, no direct access to a local exchange.

111. By the same token, MCI's characterization of AT&T's amendments to its private line tariff is misleading.[18] The amendment permits off-network access from Inward WATS, local exchange or FX lines into a Common Control Switching Arrangement (CCSA) network, but it does not allow access by the off-network user to the general public. The tariff provision referred to makes it clear that the connection is for inward access to the customer's CCSA (private line) network only. It does not permit access to another telephone off the network through the CCSA network.

112. Accordingly, we find that the services presently in effect that are cited in MCI's motion are not as MCI characterizes them, similar functionally to Execunet. The other services proposed by other carriers mentioned in the pleadings are not presently on file, and we can make no determination as to their lawfulness. Finally, MCI has cited no changed circumstances which would require a reexamination of our policies regarding competition for domestic communications services, as established in the *Specialized Common Carrier* decision.

113. As indicated, our July 2 Order is presently under stay, and the Court has retained jurisdiction over this matter. Therefore, until further action of the Court, we cannot effect on Order requiring MCI to terminate offer-

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[18] The amendment to which MCI refers was filed on November 26, 1975, Transmittal No. 21455), effective December 26, 1975, and rates were merely increased by the filing effective March 29, 1976, cited in the Motion.

ing Execunet service. However, in the event the Court lifts the stay, we believe MCI's customers require a thirty day notice from publication of this Decision in order to seek alternative communications services.

114. Finally, MCI, ASC and AT&T have filed motions to correct the transcript of the oral argument. AT&T objects to several of MCI's proposed corrections on the ground that the transcript is accurate. MCI, in all but two of its disputed items, does not disagree but rather asks us to correct misspoken words or phrases. In two items, purported statements by Commissioner Hooks, MCI argues that the transcript is an incorrect representation of the recorded argument.

115. We agree with AT&T that the transcript should represent a verbatim rendition of the proceeding, and therefore we deny MCI's motion to correct these items. In regard to the statements of Commissioner Hooks, the staff has listened to relevant portions of the tape of the oral argument and has concluded that the transcript is correct.

116. Accordingly, IT IS ORDERED, That MCI Telecommunications Corporation Tariff FCC No. 1 IS REJECTED insofar as it purports to offer Execunet service.

117. IT IS FURTHER ORDERED, That MCI must cease offering Execunet service thirty days after release of this Decision or upon removal of the stay in *MCI Telecommunications Corporation* v. *FCC*, Case No. 75-1635, D.C. Cir., which ever occurs later.

118. IT IS FURTHER ORDERED, That the following motions of MCI ARE DENIED: Request for Admission of Fact by the Commission, Motion to Take Deposition by Oral Examination of Mr. Thomas W. Scandlyn, Motion for Initiation and Conduct of a Special Evidentiary Hearing, Motion for Special Evidentiary Hearing as to

AT&T's Ex Parte Contacts with Commission Personnel, Motion for Inquiry into Public Interest Considerations Regarding Establishment of a Communications Monopoly.

119. IT IS FURTHER ORDERED, That the motions filed by ASC and AT&T asking us to correct the transcript of the oral arguments ARE GRANTED, and that filed by MCI IS GRANTED IN PART AND DENIED IN PART.

120. IT IS FURTHER ORDERED, That the charts submitted by AT&T at Oral Argument are made a part of the record in this proceeding.

121. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS IN WHICH COMMISSIONER ROBINSON JOINS

In Re: *Execunet*

There is a loose thread dangling from this proceeding which could and should have been snipped at this point. To leave the *ex parte* allegations hanging is to leave the impression that there might be merit in the instant charges. This, patently, is not the case and the longer we leave it flapping from the flagpole, the greater the danger that someone might come along and salute it.

MCI has alleged that communications pertaining to Execunet were made to Commission personnel prior to the release of our *Order* of July 2, 1975, FCC 75-799. However, nowhere does MCI suggest that any such presentations occurred subsequent to AT&T's complaint.[1] More

[1] AT&T's letter of complaint was filed, and served on MCI, May 19, 1975. On June 9, 1975, MCI's president wrote to the Commission and asked for "equal time." On June 16, 1975, the Commission responded to MCI stating that MCI had already held a series of meetings with FCC personnel on the Execunet matter.

importantly, MCI does not barely intimate that the Execunet matter was then before the Commission in any cognizable posture, let alone the quasi-adjudicatory posture necessary to bring such discussions within the purview of our rules. See generally, 47 CFR Part 1, subpart H.[2] Adversions to *Sangamon Valley Television Corp.* v. *FCC*, 269 F.2d 221 (D.C. Cir. 1959) are similarly deficient. The facts in *Sangamon* likewise reflect presentations subsequent to the initiation of a proceeding bringing the matter before the agency. Other citations used by MCI are devoid of support for its assertions for the same reason.[3]

Absent allegations which even suggest a transgression of pertinent *ex parte* strictures, it would be proper to sever and drop the issue at this point. Without foreclosing the possibility of new allegations at Oral Argument, there is nothing on the present record to warrant retention of the issue in an unresolved state.

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[2] Whether this proceeding is considered adjudicative or in the nature of restricted rulemaking, the same result would here obtain. The Commission's rules relate to presentations occurring after the filing of inaugural pleadings in adjudicative cases, 47 CFR § 1.1203, and after the institution of a rulemaking, 47 CFR § 1.1207. The rules could not invoke any other logical time for inception. To apply *ex parte* restrictions before the initiation of a proceeding would be to foreclose significantly industry-Commission dialogue on any matter of business because that matter *might* someday erupt in the course of a quasi-adjudicatory proceeding. And, the Commission has described its own rules as more stringent than required by statutory law. *American Television Relay, Inc.*, 9 FCC 2d 1004, 1009 (1967).

[3] The recent request of the U.S. Court of Appeals for the District of Columbia Circuit in *Home Box Office, Inc. v. FCC* (No. 75-1280) merely lends support to my argument. That *Order* requested only a listing of presentations made "during the rulemaking proceeding, *i.e.*, from the date the notice of rulemaking was published. . . ."

Appendix A

In its comments filed in this proceeding MCI listed a number of alleged similarities between its Execunet service and private line foreign exchange (FX) service. It also listed differences between Execunet and Message Telecommunications Service (MTS) as offered by AT&T. In addition to the existing fulltime FX service, MCI included characteristics of a hypothetical shared FX service service in its comparison. The list which follows includes a brief discussion of the validity and relevance of each of the characteristics.

I. Similarities between Execunet and FX:*

A. *Customer must subscribe to service in advance.* This is true of WATS, and in the case of a new installation, of MTS. It is not a unique characteristic of private line service.

B. *Customer can terminate service only after giving thirty days notice.* While this is not true of MTS or WATS, AT&T's WATS tariff requires a minimum thirty day initial subscription period. However, it is certainly not a functional characteristic which describes any specific category of service.

C. *Not accessible from all telephones in calling city.* Despite MCI's assertions, Execunet is available from all telephones in the calling city. If the particular instrument used is not a push-button telephone, a separate instrument can be easily purchased or leased which permits access to Execunet from any dial telephone.

D. *Cannot access all telephones in U.S.* MCI's facilities and tariff offering permit the Execunet customer to access telephones in only certain specified cities, but this is because MCI has chosen to offer the service only in those

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* MCI comments, Attachment A, Affidavit of Bert C. Roberts, Jr., 64-65.

cities. MCI is not precluded at some future date, upon proper Commission authorization, from expanding its network to the point of having sufficient officers to permit access to all telephones in the U.S. It should also be noted that a WATS subscriber generally has access to only a limited geographical area. Again, this is not a functional characteristic which typifies private line (or FX) service.

E. *Not marketed to the general public.* While MTS is marketed to the general public, WATS and Execunet are not, although any person or business has the right to subscribe to such services. The fact that MCI structured the service (by imposing a minimum charge) and marketed the service so that it aims at a certain specified segment of the business community does not change its functional character. MCI is willing and *required* to make the service available to anyone who requests it.

F. *Subscriber can use dedicated circuit to access system.* The key factor here is that a subscriber can but *need not* obtain a separate local loop dedicated to this one service. Under most circumstances, he will use his local business telephone line to access the Execunet system. MCI has testified that *no* Execunet customer presently uses a dedicated circuit to access the system. Thus, it does not significantly differ in type of access from MTS.

G. *Accessible from push-button telephone.* Virtually any telephone service, including MTS and WATS, is available from a push-button telephone. Therefore, the fact that Execunet utilizes such a telephone instrument does not characterize the service as private line.

H. *Service does not run from customer premises to customer premises.* This appears to be a characteristic which equates Execunet to MTS and WATS, not private line. While it is true that FX runs from one customer's premises to a distant exchange, Execunet, like MTS, permits the customer to access the system from on or off his

premises and to access any telephone in one of 14 other cities.

I. *Uses dedicated intercity circuits.* The Execunet intercity circuits are dedicated to the service, although they are shared by all users. However, unlike existing private line services, no local facility is dedicated to that service and not used in common for local exchange service.

J. *Intercity circuits shared for most efficient, lowest cost operation.* Again, this is true of MTS and not of most existing private line services, which use dedicated intercity trunks. While the presence of such shared trunks does not render the service not private line, neither is it a characteristic which identifies the service as private line.

K. *Metered basis for long-haul charges, with minimum.* As with J., above, this is not a typical characteristic of private line service. Rather, MTS is charged on a metered use basis, as it WATS, and WATS includes a monthly minimum.

L. *Charges do not vary with time of day.* Time-of-day pricing is only a comparatively recent development for MTS and is not available with WATS. The absence of such pricing is not necessarily indicative of private line service.

M. *Charge for termination in called city.* While it is true that MCI imposes a minor charge for termination of the called in the called city, it is neither a full time local business charge as is imposed for full time FX nor a separate termination charge for each distant termination city, as is a minimum requirement for private line service.

N. *User provided full details as to all calls.* No presently offered private line service gives the user any breakdown by call, and presently only MTS provides this service.*

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* The WATS subscriber can obtain a similar breakdown by paying an accounting cost.

The fact that MCI gives the Execunet subscriber greater detail than AT&T supplies the MTS customer does not change the character of the service. The greater detail is a convenience feature which, though it may be useful, does not functionally differentiate the Execunet service from MTS.

O. *Customer is charged for exact total of usage to each city accessed.* MCI aggregates the total connect time of a customer to a distant city over a billing period, so that fractional minutes may be combined into whole billed minutes. While MTS charges for fractional minutes as whole minutes for each call, the fact that MCI aggregates them may save the customer some money, but it by no means is a functional difference between the services. Rather, it is a minor billing difference which by no means is characteristic of private line service.

P. *Unlimited access to service.* Authorized users of the customer may make several calls simultaneously over the Execunet system. This is given as a characteristic of FX, not of MTS, but without explanation of the manner in which an FX subscriber, with a single line, can place more than one call simultaneously. It appears that only MTS of non-Execunet communications offerings permits such simultaneous use. In the case of MTS, the subscriber must either lease more than one local exchange channel or must place the call from off his premises (charging it to his own number) in order to make more than one call simultaneously. In fact, the Execunet subscriber wishing to place more than one call simultaneously from his premises must subscribe to more than one local exchange channel.

II. Differences between MTS and Execunet.** Where the listed characteristic is discussed above, a reference is made to that discussion. The first nine items are alleged to be true

** MCI Comments, Attachment A. 55-56.

of MTS but not Execunet, the remaining seven are asserted to be characteristic of Execunet but not MTS.

1. *Accessible from all telephones in calling city.* See item C above.

2. *Smaller number of digits pulsed or dialed.* Again, this can hardly be considered a functional difference between MTS and Execunet. It should be noted that over the years the number of digits required for MTS have continued to increase with the introduction of dial service, Direct Distance Dialing, and other services. Clearly, the number of digits required is not an indication of the type of service being offered.

3. *Can access all telephones in U.S.* See item D above.

4. *Marketed to the general public.* See item E above.

5. *Can place person-to-person, credit card, collect and conference calls.* These are additional convenience services which AT&T offers to its MTS users. If they were not offered, the service would still remain MTS and a majority of the calls made, those placed station-to-station, would be unaffected. AT&T contends that the ability of an authorized user to place a call from another city or another premises using his identification number amounts to a collect or credit card call. Since the listed MTS features are not essential characteristics of that service and do not distinguish MTS from Execunet, this contention has no relevance and need not be ruled upon.

6. *Can get directory assistance in distant city.* Since it is apparently possible to call directory assistance over the Execunet network, we must assume that MCI is referring to such assistance at no charge. Again, this is merely a convenience feature, the cost of which is absorbed by all MTS users. It should be noted that Execunet subscribers can obtain distant numbers by calling information over the MTS network. Further, several states have imposed a

charge for directory assistance calls within their jurisdiction. Therefore, free directory assistance is by no means a distinguishing characteristic of MTS.

7. *Has minimum calling period for billing.* As discussed in item O above, this is but a difference in billing procedures. Furthermore, it should be noted that while MTS has a pre-call minimum billing period (either one or three minutes), Execunet imposes a monthly minimum ($75).

8. *Adds charge for a full minute if call exceeds minimum by a matter of seconds.* See items O and 7 above.

9. *Includes see-while-you-talk service (Picturephone) and 50 kilobit switched service.* As with items 5 above, these are additional features, added recently to basic MTS, which are not part of AT&T's basic service. Both are currently used by a small specialized market, not by the general public.

10. *Uses identifying access code.* Both MTS and Execunet use such a code, but the code used for MTS is the subscriber's telephone number which the central office equipment is able to identify. The Execunet subscriber must actually pulse his code so that the equipment can identify him and to start the billing procedure. That is clearly a minor difference between the services.

11. *Uses shared dedicated intercity facilities.* See items I and J above. MTS intercity facilities are shared, even if they are not dedicated to one service.

12. *Subscriber can use dedicated circuit to access system.* As pointed out in item F above, the key point in this statement is that the subscriber can but need not use dedicated local loops, and no subscriber currently uses this method of access. Since the option is with the subscriber, and since the least expensive method of access is by using a local exchange telephone circuit, the distinction loses its significance.

13. *30 day minimum contract for service.* See item B above.

14. *Minimum monthly charge.* As discussed in items O and 7 above, Execunet has a minimum monthly charge while MTS imposes a minimum billing period for each call. The distinction is not a functional one but is but one of billing practice. A minimum monthly charge is also a characteristic of the tariffs for WATS.

15. *Provides full detail on all calls.* See item N above.

16. *Charge for exact monthly total of usage to each city accessed.* See items O, 7 and 8 above.

APPENDIX B

FCC 75-799

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

July 2, 1975

MCI Telecommunications Corporation
MCI Building
1150—17th Street, N.W.
Washington, D.C. 20036

Attention: Mr. William G. McGowan
Chief Executive Officer

Gentlemen:

As you are aware, the Common Carrier Bureau has been investigating your service, marketed under the name "Execunet," and the staff of the Bureau has been in continuous contact with you since prior to the effective date (October 10, 1974) of your revisions to MCI Tariff F.C.C. No. 1. A number of conversations have taken place between Bureau staff members and members of your staff since that date concerning both the offering of Execunet service and the above tariff revisions.

We note that your letters of June 9 and July 1 comment upon contacts between AT&T and the Commissioners and the staff. Prior to any such contacts, as we noted above, the staff and several Commissioners were cognizant of your service offering and had questions concerning it, and such concern had been brought to your attention by the staff. When AT&T expressed concerns to several Commissioners and to the Bureau staff regarding the lawfulness of this service, it was suggested that the appropriate course to follow would be to file a complaint. We note that the informal complaint which was filed was submitted to you for comment by letter dated May 21, 1975. Thereafter, you had a period of over one month to comment on the merits. During this period, you have filed three separate letters which we have considered herein. Thus we conclude that you have had ample opportunity to comment upon the merits. The present letter contains the Commission's conclusions regarding Execunet service.

The principal question considered in this investigation was whether or not Execunet, as offered by MCI, constitutes the type of service which your company is authorized to provide. *Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971), which established the Commission's policies regarding entry of the specialized common carriers in competition with AT&T, contemplated such entry only in the private line field, not in the area of switched public message telecommunications service. For example, in discussing the projected growth in telecommunications services, the Commission stated: "It is clear, moreover, that this projection is based primarily upon the rapidly expanding growth in local and interstate use of the standard voice communications services of the Bell System—*services which the applicants do not seek to provide.*" 29 F.C.C.2d 870, 904 (emphasis added).

The discussion in that decision relating to the economic impact of competition is replete with language indicating that the Commission was referring to competition in the

private line services field (*see*, 29 F.C.C. 2d 870, 910-12). Further, in discussing the services proposed to be offered by the new carriers, the Commission indicated (20 F.C.C. 2d 870, 874-6):

> There are also pending applications by 17 MCI associated companies for portions of a proposed nationwide network to provide specialized private line communications services . . . According to MCI, the 'real distinction which delineates MCI service from anything provided today by existing common carriers is not the facility itself but the manner in which a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability.' . . . The existing carriers serving the proposed routes allegedly do not and cannot readily provide the same type of offering . . . [MCI] would do so without having an adverse economic impact on the existing carriers or affecting their telephone or private line rate-making principles. There is, MCI says, 'a distinct difference between a public telephone service which is a natural monopoly and a customized communications service offered on a private point-to-point basis.'

In the various Commission orders granting the Section 214 applications of the MCI carriers to construct and operate facilities (e.g., 32 F.C.C. 2d 36 (1971), FCC 72-456 (May 26, 1972), FCC 72-832 (September 22, 1972), FCC 72-852 (September 29, 1972)), appears language similar to the following:

> The service proposed is essentially private line for the transmission of data, facsimile, control, remote metering, voice and other communications.

Each grant refers to the paragraph which incorporates the above language as conditioning the grant of construction

and operating authority. As a result, MCI is only permitted to operate its facilities for private line services.

Further, in our *Second Report* on domestic satellites, which followed the *Specialized Common Carrier decision*, we pointed out (35 F.C.C. 2d 844, 853 (1972)):

> In encouraging multiple entry and the development of competition in the supply of domestic communications, we have maintained a distinction between the so-called monopoly switched telephone services now being furnished by AT&T and all other classes of existing and potential specialized services.

It is thus clear that MCI sought authorization to offer only private line services, and that it was granted authority to offer only such services.

Our understanding of the Execunet service offering is as follows. A customer in the calling city calls a local telephone number from any push-button telephone in the local exchange area. He then pulses his customer code and the area code and calling number of any telephone in one of a number of distant cities. Upon connection, the customer is charged a per-minute toll, based upon the mileage to the city called, subject to a connection charge and a monthly minimum charge. Any MCI Execunet customer in the calling city can access the system at any time to place a call, and presumably many such customers may utilize the intercity facilities simultaneously. In other words, none of the MCI plant is dedicated to the use of a particular customer during any specified time; rather it is available upon demand. Clearly, therefore, the Execunet service is not a traditional two-point or multi-point private line offering connecting two or more specified customer locations.

In his letter of June 5, 1975, Bert C. Roberts of your company equated Execunet to AT&T's foreign exchange

(FX) service offering, Series 2006 of its Tariff F.C.C. No. 260. In response to that allegation, we shall now address the specific differences between FX as offered by AT&T and your Execunet offering. First, FX is specifically excluded from the joint use provision (3.1.5) of Tariff 260, while the inter-city facilities used for Execunet are shared by all users of the service. Second, FX is available to access one distant exchange area toll free, from the customer's premises in the calling city, while Execunet can be accessed directly from any push-button telephone (or from any telephone, using a separate tone generator) in the calling city to call any telephone in any one of a number of distant cities, but always at a toll charge. Third, an FX customer uses dedicated facilities from his location to the distant telephone company exchange office, and these facilities are available at all times, while the Execunet customer uses common local exchange plant at both ends, connected by inter-city facilities which are not dedicated to any specific customer but are shared by a number of customers. Fourth, the FX customer is billed a periodic charge for the FX line, calculated on a mileage basis, plus a monthly local service charge at the distant location, while the Execunet customer is billed for each call, based upon time and distance, subject to a monthly minimum, with no charge added at the distant city.

Execunet is therefore distinguishable from the above-mentioned services which AT&T includes in its private line tariff, F.C.C. No. 260, while there are many basic similarities between Execunet and MTS. For example, both use non-dedicated local and inter-city facilities, both are accessible on demand by any customer, both charge on a per-call basis, both are available from any telephone in the calling city (Execunet is subject to the push-button telephone limitation, but this is caused only by technical limitations) and both may be used to call any telephone in one of a number of distant points.

While no one of these characteristics is necessarily sufficient in itself to classify Execunet as identical to MTS, the combination of these similarities, under the factual situation presented here, inescapably leads the Commission to conclude that your Execunet service is essentially a switched public message telephone service, rather than private line.

In your July 1, 1975 letter on pages 8 and 9, you cite various service offerings which you feel are the same as Execunet. While it is clear that some of these offerings may contain certain elements similar to Execunet, they are not the same service as Execunet nor does any one service contain all the elements of Execunet. For example* customers of Datran Datadial service, Western Union Hotline service, and Composite Data Service Vendors are not able to access the general public as are customers of Execunet. Customers of specialized common carrier FX-type services must, by definition, have a "closed-end" terminating at a customer's premises.

Since your authorizations are limited to private line services, you cannot lawfully tariff and operate other services on these facilities. *Press Wireless, Inc.* v. *F.C.C.*, 264 F.2d 372 (D.C. Cir. 1959). As a result, your tariff F.C.C. No. 1, is hereby rejected insofar as it purports to offer Execunet service, but without prejudice to MCI's offering any other service which you are authorized to provide. To afford your customers a transition period in which to arrange for alternative service, the effective date of this order shall be 30 days from its release.

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* Our discussion of any of these services does not constitute a finding as to their lawfulness, as that is not before us.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

Federal Communications Commission
Washington, D.C. 20554

May 21, 1975

MCI Telecommunications Corporation
MCI Building
1150 - 17th Street, N.W.
Washington, D.C. 20036

Attention: Mr. William G. McGowan
Chief, Executive Officer

Gentlemen:

Enclosed is a copy of a letter dated May 19, 1975, which Chairman Wiley received from Mr. James R. Billingsley, Vice President of the American Telephone and Telegraph Company. Mr. Billingsley states that your "Execunet" service is not properly tariffed with this Commission, and that the service constitutes the provision of long distance message telephone service which MCI is not authorized to provide.

Your comments on this matter would be appreciated. We trust you will be able to reply, in duplicate, within 15 days of the date of this letter.

Sincerely yours,

Walter R. Hinchman
Chief, Common Carrier Bureau

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
195 BROADWAY
NEW YORK, N.Y. 10007

James R. Billingsley
Vice President

May 19, 1975

The Honorable Richard E. Wiley
Chairman
Federal Communications Commission
Washington, D.C. 20554

Dear Chairman Wiley:

I am writing to call your attention to the fact that MCI Telecommunications Corporation is currently offering interstate long distance message telephone service. MCI has not been authorizd to provide this service, which it calls "Execunet", and has not properly tariffed it with the Commission.

Briefly, in the Execunet service, the MCI subscriber utilizes ordinary local telephone service to call any Bell or Independent Telephone Company subscriber in specified distant localities. None of the facilities used in the service are dedicated; they are instead trunks, access lines, and switching used in common by all users (MCI's customers may also use Execunet service from a dedicated facility tied to a switchboard or key set.)

An MCI Execunet customer can use any ordinary exchange telephone (including public coin telephones) to call a telephone number for which MCI has subscribed in the originating city. After the customer gives an identifying code, he pulses the standard telephone area code and seven-digit number of the party he wants in a distant city. MCI carries the call over its facilities to the distant city and puts the seven-digit number into telephone company facilities. The telephone company then has to complete the call as if it were an ordinary local call placed by a local telephone subscriber. The local telephone com-

pany does not receive any of the usual compensation for completing an interstate long distance call.

Execunet service is simply long distance message telephone service. MCI never has sought authority to enter the long distance message telephone business (in fact, it has said it did not intend to provide long distance toll service). The Commission has granted MCI authority only to provide private line services and the Courts of Appeals, in affirming Commission decisions, have recognized these facts.

The Commission has indicated on several occasions its concern with the technical and economic effects on the nation's consumers of fragmenting the long distance message business.

MCI is promoting its services with those who make a large portion of the toll calls between big cities. The provision by MCI of long distance message telephone service will adversely affect the nation's telephone users at both the interstate and intrastate levels. It could, if continued, result in a marked increase in the cost of local and long distance services for the large body of telephone customers, both residence and business.

MCI's tariff filings with the Commission have not reflected its entry into the message toll telephone business. Its tariffs do not adequately describe Execunet service as it is described in MCI's promotional literature or as it is in fact being provided.

I hope that the Commission will take appropriate enforcement action to stop the unauthorized Execunet service. It appeals to me that the public interest demands no less.

Prompt Commission action would minimize the disruption, inconvenience and economic waste affecting our customers, MCI and MCI's customers.

Very truly yours,

JAMES R. BILLINGSLEY

MCI TELECOMMUNICATIONS CORPORATION
MCI BUILDING 1150 17TH ST., N.W.
WASHINGTON, D.C. 20036

Vice President

June 5, 1975

Mr. Walter Hinchman
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D.C. 20554

Re: Your Reference No. 9510

Dear Mr. Hinchman:

On behalf of MCI Telecommunications Corporation, I am responding to your letter of May 21, 1975, requesting comments on a letter dated May 19, 1975, to the Commission from Mr. James R. Billingsley, Vice President of the American Telephone and Telegraph Company (AT&T) concerning MCI's Execunet service. My responsibilities at MCI include both tariff administration and the development of new services, of which Execunet is one.

Mr. Billingsley claims that MCI, through its Execunet service, is offering interstate long distance message telephone service and that it has not been authorized to provide this service and has not properly tariffed it with the Commission.

I am surprised that AT&T is objecting to the FCC about the Execunet service at this late date. The tariff matter which, with previously filed tariff provisions, offered the service, was filed with the Commission on September 10, 1974, (with Transmittal No. 16) and went into effect on October 10, 1974. MCI has publicized and marketed the service since late 1974. As I am sure you know, AT&T has furnished MCI—as it is required to do by past commission orders—with the local facilities necessary to

provide Execunet service. It has billed us for such service and has been paid. So, there can be no doubt that AT&T has been aware of MCI's Execunet service offering since at least October 1974, when business access lines were first ordered in anticipation of January service dates. Such lines for use in offering Execunet service have been ordered from most of the Bell Operating Companies. Their local representatives have asked questions concerning the MCI tariff provisions for this service and were given the appropriate tariff references. However, no formal action was taken prior to Mr. Billingsley's letter.

As you are undoubtedly aware, MCI has discussed the Execunet service on several occasions with your staff, both before and after the filing of the tariff changes under which the service is offered to the public. As was explained to the staff, Execunet is a private line service which permits sharing of intercity circuits terminating in business telephone arrangements in distant cities for the provision of what AT&T calls foreign exchange (FX) service. The Commission has, on numerous occasions, held that MCI is authorized to provide such service. Execunet is also a form of Metered Use Service, a general category of service covered by tariff provisions which—as pointed out above—were filed with the Commission on September 10, 1974.

As was explained in the covering transmittal letter, Metered Use Service was designed for the business user not having sufficient communications requirements to utilize MCI's other private use offerings. The service was offered not only to enable MCI to achieve greater utilization of its backbone microwave system, but also to provide service to the smaller business user at prices he could afford and to enable heavier-volume users to supplement their other MCI service, thereby obtaining an efficient mix of service more closely matching their specific needs. Metered Use Service was offered on a per-mile-per-hour

basis, with a minimum charge of $75.00 per month applicable to the combined Long Haul and Customer Service charges. MCI also added a provision that, at a customer's request, when a circuit is terminated in a local business telephone line, a charge of $15.00 per month would apply. That termination charge, of course, applies to FX services such as Execunet. Metered Use Service is covered in Section D-1.02 (page 19) of the MCI tariff in a description of MCI's Private Use Service, and is also referred to in Section C-3.02 (page 10). The charges for the service are found in Section D-5.013 (page 22.1).

The September 10, 1974 filing included supporting economic data pursuant to Section 61.38 of the Commission's Rates. On October 9, 1974 (Transmittal No. 18, pursuant to Special Permission No. 7433) MCI filed a clarification to the footnote to Table IV—Circuit Termination Charges to make it clear that the $15.00 per month charge for a local business telephone line would be pro-rated when shared by a number of MCI customers. No party objected to either of these tariffs and, as noted above, both became effective on October 10, 1974. The first Metered Use Service marketed when the tariff became effective was Quickline. Execunet service was first marketed late in 1974.

MCI's tariff is organized on a modular framework, rather than in terms of the marketing packages it offers its customers. Each functional component set forth in the tariff is capable of being combined with other components to produce particular services suitable to customers' varying needs. In its marketing efforts, MCI uses terms like "Execunet" to describe particular combinations of tariff elements to be offered to meet particular needs. For example, MCI's standard 4 KHz private lines are marketed as "4K Plus Voice" or "4K Plus Data" though neither term appears in the tariff. This is no different than Bell's marketing its bulk discount private line service under the "Telpak" designation without either using or defining that term in its Tariff FCC No. 260.

AT&T has repeatedly charged—in many forums—that the specialized carriers have not provided innovative services, yet it protests when MCI attempts to offer a new service like Execunet. Just because Bell restricts users of its own foreign exchange service to full-time use from a fixed location at flat-rate charges does not mean that the public should be denied more flexible or lower cost alternatives—or that competitors should be barred from offering such service. MCI permits users of its Execunet service to utilize full-time private line circuits terminating in business telephone arrangements in distant cities on a shared basis. It allows them to access this shared private line network either from their offices or from any push-button telephone in their own exchange area. MCI provides a computerized private line control assembly to connect the customer to a private line serving the city he wishes to reach—MCI now provides the service between fourteen cities—and to account for the time he occupies the channel. The customer is billed at the end of the month for his usage on the basis of the time and distance involved and is given significant information concerning the usage he and his employees have made of the Execunet facilities. Business customers find Execunet a useful and flexible service which is not available from AT&T—the kind of innovation the Commission has looked to the specialized carriers to provide.

AT&T has consistently tried to bar or restrict the development of competition on communications. It opposed new entry in Docket 18920 and later petitioned for a moratorium on further authorization of specialized carrier facilities. AT&T refused necessary interconnections to the new carriers until the Commission and the reviewing court ordered it to provide such facilities. It has thereby limited MCI's geographical extension of its facilities by curtailing its revenues. AT&T is really trying to bar any alternative service which would be cross-elastic with any

of its own services by exaggerated claims as to the impact of competition on its revenues. And now—despite its criticism that the specialized carriers have not provided innovative services—AT&T wants to limit competitors, and the public, to just those kinds of services it has offered all along itself. It even wants everyone else's services tariffed in the same way it handles its own services. But the public wants more flexible and more economical service—and the Commission has staunchily maintained the competitive opportunity it opened up in Docket 18920.

AT&T allows shared use of its private line facilities—including sharing of Telpak for the airline industry, subsidiaries of the same parent corporation, agencies of the United States Government, state and local governments, etc. It, therefore, cannot object to Execunet on the grounds that it involves sharing unless it contends that only large customers of its choosing, and not small businesses, are to be allowed to share. Furthermore, the Commission now has a proceeding underway to explore expanded sharing and resale of communications facilities.

Apparently AT&T's principal complaint is that Execunet can be used as a limited alternative to long distance message telephone service. But the same thing is true of any foreign exchange service—and, indeed, of any private line service—and the results are the same whether MCI or AT&T provides this alternative mode of communications. The only way long distance message telephone service can be sheltered from the effects of its cross-elasticity with other communications services is to prohibit all such alternatives and force everyone to use Bell's DDD network as the exclusive means of intercity communications. However, the Commission has repeatedly found that competition in intercity communications is in the public interest.

Mr. Billingsley complains that an Execunet customer "can use any ordinary exchange telephone (including pub-

lic coin telephones)" to access MCI's intercity facilities. Of course, the customer pays the telephone company for this use of its facilities just as he pays for all the other local calls he places. Furthermore, AT&T itself allows large users to dial into their corporate networks from any telephone. Mr. Billingsley also objects that the Bell telephone company in the distant city "has to complete the call as if it were an ordinary local call" but "does not receive any of the usual compensation for completing an interstate long distance call." But he ignores the fact that the company receives its tariffed rate for the business telephone arrangement used to access its exchange area, and that it doesn't receive "any of the usual compensation" when a Bell FX customer calls one of its exchange subscribers from a distant city.

Mr. Billingsley repeatedly says that Execunet service is long distance message telephone service and that MCI has never been authorized to provide it. So far as I know, AT&T has never been authorized by the Commission to furnish interstate long distance message telephone service either, but simply does so by virtue of having constructed facilities and filed tariffs to provide the service. MCI has done the same thing with respect to Execunet, which is clearly different from Bell's universal public switched message service.

AT&T's Tariff F.C.C. No. 263 covers its Long Distance Message Telecommunications Service. Section 2.1.1 describes the scope of the service as follows:

> (A) Long Distance Message Telecommunications Service is that of furnishing facilities for telecommunication between stations in different local service areas in accordance with the regulations and system of charges specified in this tariff. The message charges specified in this tariff are in payment for long distance telecommunications service furnished between the calling and called stations. Long dis-

tance message telecommunications service includes See-While-You-Talk Service as set forth in 3.8 following and 50 Kilobit Switched Service as set forth in 3.9 following.

(B) The Telephone Company does not undertake to transmit messages but furnishes the use of its facilities to its customers for communications.

Obviously, MCI's Execunet service does not include See-While-You-Talk Service nor 50 Kilobit Switched Service, nor does it offer telecommunications between all of the more than 20,000 local service areas interconnected by Bell's facilities or provide service anywhere in accordance with the regulations and charges specified in Bell's tariff. Instead, Execunet is a service for business and other similar entities having significant communications requirements between a relatively few communities. While its shared features bring it within the reach of smaller businesses which cannot afford full-time private line service, the costs are beyond the means of all but a very small percentage of the millions of users of AT&T's interstate message telecommunications service (MTS). Execunet customers get no operator assistance, can't get directory assistance in distant cities, can't place conference calls, and can't enjoy other features of Bell's MTS service. They can communicate only to certain designated cities. Execunet is a specialized service customized to fit the needs of business and other similar users. It permits its users to do some of the things they could accomplish through MTS, but they will all have to continue to use the basic MTS service for many, perhaps most, of their communications requirements.

Mr. Billingsley complains that "MCI is promoting its services with those who make a large portion of the toll calls between big cities." That is true in the sense that all of the specialized carriers' services are designed to meet

the needs of business and data communications users who have substantial and continuing communications requirements. But I doubt whether these entities, which are limited in number, account for a "large portion" of Bell's toll business between big cities. Mr. Billingsley offers no support for that statement, or for his claim that Execunet "will adversely affect the nation's telephone users." This is simply part and parcel of AT&T's repeated, but unsubstantiated, claims that competition—whether from the specialized carriers or the suppliers of terminal devices—will result in increased costs for most communications users. AT&T has not established these extravagant claims anywhere—even in Docket 20003, which was initiated to explore such allegations of economic harm and related issues.

Finally, Mr. Billingsley complains that MCI's tariff does not "adequately describe Execunet service as it is described in MCI's promotional literature or as it is in fact being provided." The simple answer to that is that AT&T's tariffs do not describe its services—MTS, WATS, Telpak, FX, CCSA, etc.—as they are described in its promotional literature or as they are in fact provided. While AT&T does set forth its offerings in great detail, broken down—in the case of private line service—into many different "series", its tariffs deal with the limitations, regulations, rates, etc. applicable to the various offerings and are not couched at all in marketing terms. The same is true of MCI's tariff with respect to Execunet and all the other services MCI offers. That term does not appear in the tariff, nor are the characteristics and advantages of the service described there in language intended to persuade prospective customers to subscribe. But the tariff contains all the components necessary to offer and provide the service, determine the charges therefor, and prescribe the terms subject to which subscribers can use the service. Nothing more is necessary. Execunet service

is properly tariffed and is being provided in accordance with the tariff—which was not protested by AT&T or anyone else on a timely basis nor questioned by the Commission on its own motion. It is lawful and in the public interest—and has been well received by the business community as an innovative and efficient communications tool.

Although Mr. Billingsley asks the Commission to "stop" MCI's Execunet service, the request seems almost frivolous. His letter is only a page and a half in length and includes no data whatsoever to support his claims. It was filed *seven months* past the deadline provided by the Commission's Rules. On the same day, however, AT&T filed an Opposition to RCA Globcom's formal Petition to Reject certain provisions of AT&T's Tariff F.C.C. No. 260 (Transmittal No. 12306). In that pleading AT&T stated:

> "Of the participants at these meetings, only RCA Globcom—*by an untimely pleading* filed *seven days* after the March 18 revisions became effective—seeks to attack those provisions, despite the fact that it had full knowledge of the revisions prior to filing and despite the fact that the revisions were filed on full statutory notice."

Mr. Billingsley simply advances conclusory statements as to the nature of the Execunet service, the adequacy of MCI's tariff, the potential impact of such an innovative competitive service, and his own view of the public interest. Certainly that is not enough to justify or require any Commission action with respect to MCI's Execunet service.

I trust this will serve to respond to Mr. Billingsley's letter.

Sincerely,

BERT C. ROBERTS

MCI TELECOMMUNICATIONS CORPORATION
MCI BUILDING 1150 17TH ST., N.W.
WASHINGTON, D.C. 20036

June 9, 1975

Mr. Walter Hinchman
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Hinchman:

Because I was out of town at the time (having returned just Friday from several days of travel), I asked Bert Roberts to reply to your letter of May 21, 1975, in which you asked us to answer several objections raised by AT&T's Mr. Billingsley regarding our Execunet Service. Bert has done so, I believe, competently and completely, and I do not wish to add anything further to his statement in response to Mr. Billingsley's letter at this time.

I would like to comment, however, on the way the Billingsley complaint was handled and, specifically, on the matter of "lobbying" at the Federal Communications Commission.

Since receiving your letter and that of Mr. Billingsley on May 27, I have been puzzled as to why the letter, which seemed almost casual, evoked such prompt response by the Commission in view of the agency's backlogs, as evidenced by the fact that far more serious matters, such as the problems with joint Telpak and Tariff 260's blatant discrimination in prohibiting interconnection with SCC's, are still waiting for resolution.

Within the last few days, I have received information which, I believe, clears up this puzzle. Apparently, the rather innocuous letter which you forwarded to us was only the tip of the iceberg. AT&T's real objections to Execunet were, it seems, presented forcefully by telephone

and in person to members of the Commission and its staff before the letter was written. Complete with brochures and sophisticated presentation techniques, this effort seems already to have spurred some members of the Commission's staff to pre-judge the matter before MCI has had even the chance to present its side of the story. Obviously, no individual at the Commission could have known, listening to what may have seemed to be simply an informal and purely "informational" presentation, either the carefully-planned nature or the pervasiveness of AT&T's activities or that AT&T planned almost immediately to file a protest against Execunet. These turn out to be the facts, however; facts which deserve to be brought to your attention because they change the nature of this whole dispute.

It seems clear at this point that AT&T has, once again, used (or abused) the administrative process in its continuing fight against competition. While we will be able to deal with this and similar abuses in one way in our antitrust suit, the remedies available in that case will come far too late to provide relief from the present, seemingly continuing, need to spend time and effort vainly attempting to match the personnel and resources of the world's largest corporation, especially since the enormous cost of this kind of "lobbying"—at the Commission, on Capitol Hill, and elsewhere—is borne not by the corporation itself or its shareholders, but by its monopoly customers.

This most recent tactic is typical of the kind of several-fronted war we have had to fight with AT&T ever since we went into business. While AT&T is raising loud cries of harm at the Commission and elsewhere about an MCI service the current gross revenues of which amount to a paltry $19,500 per month, is operating company subsidiaries are delaying the provision of local connections for circuits which will mean over $1 million in monthly gross revenues to MCI *when they are installed.* For example, Pacific Telephone and Telegraph told us just

last week, that its previous commitments to supply local connections—commitments which have been in effect since we began construction of our final link to the West Coast —are not going to be met. This delay will cause the loss of hundreds of thousands of dollars in revenue to MCI, as well as great inconvenience to our customers.

Most frustrating, however, is the fact that in this case, as in so many others, AT&T seems to be trying to win, not on the merits of its argument, but by what I believe is called "deep pocket" strategy. Perhaps the most blatant example of this kind of activity is their effort to pit their unlimited resources against our own very scanty ones by responding to our antitrust suit with a countersuit accusing *us* of "attempting to monopolize" the relevant market.

I am not requesting a hearing on this matter. No need for such time-consuming and expensive procedures has been demonstrated by AT&T. But, I do not want the Execunet matter to be resolved simply on the exchange of letters between Mr. Billingsley and Bert Roberts—especially since AT&T has seemingly already obtained a "hearing" on much more substantial arguments than have been brought to our attention. Instead, I am asking for what seems only fair: That MCI be allowed "equal time" with each of the persons with whom AT&T representatives spoke or corresponded with respect to Execunet.

I appreciate the fact that you will not be able to reply fully to this letter until you have determined the total extent and nature of AT&T's activities, and perhaps have reviewed them with the Commission's general counsel. While you are investigating, I assume that you will immediately request from AT&T the names of all its people who spoke to Commission personnel, either by telephone or in person, about Execunet, the names of the people at the Commission to whom they spoke, the date and length of those conversations, what brochures or other materials were used, the substance of the oral presentations made,

and such other pertinent information as you may see fit to obtain. When this information is available, I would then simply ask that MCI be allowed also to meet informally with each of the people to whom AT&T has made such presentations for an equivalent period of time so that they may at least hear both sides before the Commission takes further action in this area. While we do not wish, once again, to be put in the position of having to endure interminable and expensive hearings simply because AT&T is willing and able to outspend us in its efforts to influence the Commission, we do, nevertheless, wish to be heard on this important matter!

Thank you for your attention to this matter.

Very truly yours,

MCI TELECOMMUNICATIONS CORPORATION

WILLIAM G. McGOWAN
Chairman of the Board

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
195 BROADWAY
NEW YORK, N.Y. 10007

T. W. Scandlyn
Assistant Vice President

June 13, 1975

Mr. Walter R. Hinchman, Chief
Common Carrier Bureau
Federal Communications Commission
Washington, D.C. 20554

Re: Your Reference 9510

Dear Mr. Hinchman:

This is in response to your request for comments on the letter of June 5, 1975 from Mr. Roberts of MCI to you, concerning Execunet service.

I will avoid a point-by-point discussion of MCI's comments since to do so might divert attention from the real issue in this matter, i.e., *Is MCI authorized to provide Execunet service?*

The keystone of MCI's reply is its assertion that "Execunet is a private line service" (p. 2). Nowhere does MCI claim the right to offer anything other than private line services. Any contention now by MCI of wider authority would be squarely inconsistent with the plain language of the Commission's orders which permit MCI to offer only private line services. (For the Commission's convenience, we attach an Appendix, which includes some citations from Commission decisions and briefs, as well as statements by MCI and by the Courts, which make this limitation clear.)

On April 23 of this year, the Commission, in its brief to the U.S. Court of Appeals in Washington, D.C., stated the differences between "private line service" and "ordinary long distance telephone service." The Commission said:

> "'Private line service' customers get full-time use of a dedicated circuit or circuits for a fixed periodical charge. The customer has access to continuous communications without establishing a new connection for each call or message . . . Private line contrasts with ordinary long distance telephone service, in which a toll is charged for each call; and with wide area telephone service (WATS), in which the customer may make an unlimited number of calls for a fixed periodical charge but must establish a new connection for each call as in ordinary long distance service. . . ." (*AT&T* v. *FCC*, No. 74-1953, p. 3, footnote.)

This definition of "private line service" is totally consistent with the definition contained in the Opinion of the

U.S. Court of Appeals in New York (*AT&T* v. *FCC*, 487 F.2d 865, 868), wherein that Court stated:

> "Private line service provides the user an exclusive channel for continuous communications between two or more places without the necessity of establishing a new connection for each message";

and each of these comports with the definition contained in Section 21.1 of the Commission's Rules:

> "*Private line service.* A service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time."

Under these clearly enunciated standards, Execunet is not, in fact, a private line service, as MCI contends, but is instead a long distance message telephone service.

What are the undisputed facts as to how Execunet is provided and how MCI's patrons use the service? Execunet is a station-to-station service, offering customers the capability of using *any* telephone provided as a part of local exchange telephone service (including any public coin telephone) to call any local exchange telephone in distant metropolitan areas. The charges for each call are accumulated on a time and distance basis. For each call, the transmission path between the two stations traverses a local telephone company subscriber loop, local telephone company common-user switching and trunking in the originating city, MCI interstate common-user switching and toll trunking, local telephone company common-user switching and trunking in the distant city, and a local telephone company subscriber loop which connects the local telephone company central office to the called telephone. None of the facilities used for any call is devoted solely to calls between the calling and called telephones. Indeed,

except perhaps for the MCI facilities (as to which AT&T has no knowledge), none of the facilities is even used for just Execunet service. In the case of *each* call, a new talking path must be set up by the use of network control signalling equipment.

When these undisputed facts are measured against the tests which the Commission and the Courts have applied, it is perfectly apparent that Execunet is a long distance telephone service and not a private line service. Thus, Execunet customers do not have the "exclusive" use of "dedicated circuits;" instead they use circuitry and switching equipment in common with other users. Execunet customers do not pay "a fixed periodical charge;" instead "a toll is charged for each call" (with a minimum monthly charge). Furthermore, Execunet's customers do not have "access to continuous communications without establishing a new connection for each call or message;" instead "a new connection [must be established] for each call."

MCI erroneously claims that Execunet is a private line service because according to MCI it provides "what AT&T calls foreign exchange (FX) service," a service which the Commission has authorized MCI to provide (p. 2). As you know, the Commission's ruling on FX is now pending in the Supreme Court, but in any event, Execunet cannot possibly be confused with FX service.

FX service affords a customer in City A the ability to subscribe to exchange telephone service in a single specific distant city, as if physically located there. FX does this by providing what is denominated in AT&T tariffs as, and was therefore held by the Commission to be, a private line channel between the customer's premises in City A and a central office in the distant city. This channel is dedicated for the exclusive use of the customer. Moreover, it is the *customer* in City A who subscribes to the local exchange service in the distant city and his name

and telephone number are listed in the telephone directory for that locality.

The many significant differences between Execunet and FX are apparent. Under Execunet service, unlike FX, the MCI patron does not subscribe to local telephone service in the distant city; similarly, the customer for long distance message telephone service (MTS) does not subscribe to local telephone service in the distant city. Execunet provides service to a choice of cities, just as MTS does, rather than to a single city as is the case with an FX line. In any distant city, MCI uses the local switched message network to complete the Execunet call, just as the telephone companies do in connection with MTS calls. Further, the MCI patron then pays to MCI a single charge covering both the intercity haul and the local hauls in the distant city, which is not the case with FX.

Each of these facts with respect to the service in the distant city is enough to distinguish Execunet from FX. But when there is added to them the further facts that Execunet uses non-dedicated circuitry between the originating station and the called station in the distant city, that a new connection must be established for each call, and that the charges to the customer for access to the distant city are based upon time and distance of the calls actually made, it can be seen that the only resemblance which Execunet, as a whole, bears to FX is that both permit intercity communication. Indeed, the above details as to Execunet are an apt description of the basic nationwide service which the Bell System has long provided—Long-Distance Message Telecommunications Service.

I believe that the above establishes without doubt that Execunet is not private line service, as MCI claims, and that MCI's provision of it is unauthorized and unlawful. This is enough, without more, for the Commission to institute prompt enforcement proceedings.

It would be useful to comment very briefly on several of MCI's peripheral assertions. For instance, MCI expresses "surprise" that "AT&T is objecting to the FCC . . . at this late date." AT&T's objection to the provision of an unauthorized service, however, raises public interest questions, as to which any private delay cannot be controlling. MCI cannot simply usurp the authority to provide a service for which it needs Commission permission as it has attempted to here.

In any event, MCI should not be surprised since it did not conceal pertinent facts. AT&T, finding MCI's tariff materials confusing and inadequate, wrote to MCI on November 6, 1974, to ask for the pertinent facts (see Attachment A hereto). MCI's response was a request for copies of local exchange tariffs. These were sent to MCI on December 3, 1974. MCI has never supplied any of the facts requested in AT&T's November 6 letter and apparently never intended to do so. In view of MCI's lack of candor, AT&T was forced to conduct its own investigation of the so-called Execunet service when it first surfaced in January 1975 (MCI letter, p. 1), and, unfortunately, that took time. A full understanding of Execunet service had to await our obtaining some of MCI's promotional material since their service could not be understood from their tariff and since they would not supply pertinent facts.

MCI also argues that Execunet is properly tariffed. There are, however, a number of specific areas with respect to Execunet in which the tariff is patently deficient. The tariff may be "modular" (MCI letter, p. 3), but there is just no way to put together the individual tariff pieces cited at page 2 of MCI's letter so as to describe the Execunet service actually being provided. (For the Commission's convenience, I am enclosing as Attachment B a brochure which MCI is using to promote Execunet.) MCI's tariff clearly violates Section 203 of the Act and the Commission's Rules as to tariff filings.

A further tariff violation arises from the fact that Execunet service is available to call telephones in more than 115 local telephone exchanges in the territories of more than 30 independent telephone companies, none of which is listed in the MCI tariff. This violates Section 61.55 of the Commission's Rules.

In conclusion, may I state emphatically that there is no issue here of an innovative service. Execunet is not innovative; it is actually nothing but message telephone service which AT&T has been providing for decades. MCI's only "innovation" is to offer lower rates to all except occasional and small toll users, inevitably at the expense of the general telephone user. MCI's offering of Execunet, which is message telephone service, is unauthorized and unlawful.

We believe the above facts provide the Commission with the necessary information to institute prompt enforcement action to stop the unauthorized Execunet Service.

Very truly yours,

T. W. SCANDLYN
Assistant Vice President

ATTACHMENT A

AMERICAN TELEPHONE & TELEGRAPH COMPANY
195 BROADWAY
NEW YORK, N.Y. 10007

William J. Schindele
Assistant Vice President

November 6, 1974

Mr. L. E. Harris, Vice President
MCI Telecommunications Corporation
MCI Building
1150 17th Street, N.W.
Washington, D.C. 20036

Dear Mr. Harris:

This letter is written on behalf of the New York Telephone Company, The Bell Telephone of Pennsylvania, The Chesapeake and Potomac Telephone Company, the Ohio Bell Telephone Company, The Michigan Bell Telephone Company and the Illinois Bell Telephone Company with regard to MCI's tariff offering of Metered Use Servise as set forth in your letter of transmittal and tariff material sent to the FCC on September 10, 1974 and on October 9, 1974.

MCI has ordered exchange business service in New York, Philadelphia, Pittsburgh, Washington, Cleveland, Detroit, and Chicago to be used in conjunction with MCI's metered service. After reviewing the material submitted to the FCC, the Bell System Companies involved believe that MCI's proposed use of Bell System exchange service may violate the resale provisions of their tariffs. We find, however, that the tariff material filed with the FCC relative to Metered Use Service and the use of local exchange service for terminations is inadequate to permit a definitive resolution of this question. It lacks sufficient detail

to enable us to determine how the service will operate. We require additional information in order to judge such effect. In addition, since this type of use was not contemplated when exchange equipment was installed and exchange rates were established, it is necessary to consider the effects on rate structures and levels of charges.

In order to pursue our evaluation, we have developed a series of questions, the answers to which are essential for a comprehensive evaluation. We would appreciate your reply to each of these questions in as full detail as possible bearing in mind that our prime concern is the effect of MCI's use of exchange business service on local switching and exchange services.

Your prompt reply will be appreciated.

Very truly yours,

WILLIAM J. SCHINDELE

Questions Related to Metered Use Service
When combined with Bell Exchange Service

1. What are the basic components of MCI's *overall* Metered Use Service, when combined with Bell Exchange Service, that is facilities and equipment, both MCI's and Bell's and how are they interrelated to make up the entire service from calling party to called party?
2. How will MCI's Metered Use Service work when combined with Bell Exchange Service, that is, what are the steps that a calling party will take and how does each of the respective components function as the call proceeds from the calling party to the called party? Also, will the service operate in both directions, that is, could calls be originated at either end?
3. In MCI's view, what is the applicability to this new service of the various limitations under Bell tariffs,

both general exchange and interstate, against resale of telephone service?

4. In MCI's view, what is the applicability of this new service to the joint use provision under Bell general exchange and interstate tariffs?

5. Does MCI plan to offer an unlimited calling area in conjunction with Bell exchange business service? If not, what restrictions will be placed on the customer and how will they be accomplished?

6. Does MCI plan to utilize any of the various "extended area service" or "local calling plan" services offered by several of the respective Bell operating companies in conjunction with exchange business service? If so, to what extent?

7. Assuming the service operates in both directions and calls are orginated from the exchange network, what procedures will be used to notify, 1) the originating MCI patron of the call progress and 2) the random non-MCI patron who erroneously dials the exchange number of the status of his call?

8. Does MCI contemplate that the service will ever entail business lines at both ends of MCI's intercity facilities?

9. In a number of instances MCI's requests for exchange business lines from the Bell Companies have explicitly requested Touch Tone Service, what is the relation of these requests to the service offering?

10. How will various MCI customers be assigned to the MCI intercity facilities and the Bell exchange business lines, that is, how will customers be grouped and will they be scheduled to specify intercity and exchange facilities or will all customers share all similar facilities in common?

11. Will there ever be any circumstances where an MCI customer in one city will be able to access two or more other cities over a single access facility? If this is contemplated how will it be accomplished?

12. What plans does MCI have to monitor traffic flow on MCI Metered Use facilities associated with Bell exchange business lines and what are MCI's plans to balance such use by groups of customers? What are the expected busy hours by lines or cities and what are the expected CCS (hundred call seconds) or use?

13. On what basis does MCI intend to "prorate" the monthly $15.00 it charges its customers for connections to exchange business service and especially in areas where Bell provides message unit service how does MCI propose to bill the appropriate customer for multiple message unit calls? In a similar vein, how will MCI associate toll charges with specific customers?

14. Does the use of exchange business service provided by the Bell System apply to all of MCI's private line services, that is, Full Time, Part Time, and Metered Use Service? If so, under what conditions?

EXECUNET SERVICE

EXECUNET SERVICE IS NOW AVAILIBLE FROM DALLAS AND HOUSTON.

THE RATES ARE AS FOLLOWS:

DALLAS TO:	Rate Per Minute
Chicago	.28
Houston	.16
New York	.41
Oklahoma City	.15
Tulsa	.16
Washington, D. C.	.37

HOUSTON TO:	
Chicago	.31
Dallas	.16
New York	.42
Oklahoma City	.20
Tulsa	.21
Washington, D. C.	.38

EXECUNET SERVICE IS NOW AVAILABLE FROM WASHINGTON TO DALLAS AND HOUSTON.

THE RATES ARE AS FOLLOWS:

WASHINGTON TO:	Rate Per Minute
Dallas	.37
Houston	.38

EXECUNET SERVICE
An exclusive offering from MCI

EXECUNET Service, a new, economical private-line communications network is now available to business organizations. This exclusive offering features these immediate benefits:

- Up to one-third reduction in monthly communications expenses to any business organization making calls to distant metropolitan cities on MCI's network.
- Access to EXECUNET may be gained via a local telephone number or from a dedicated facility tied directly to a switchboard or keyset.
- Monthly premium of $75.00 (plus a connection charge of approximately $30.00) provides a business organization with an around-the-clock private-line network to all the cities served.
- No start-up costs are involved, assuming a standard push-button phone is available.
- No waiting. You can start saving immediately. Service is cancellable on thirty days' notice.

EXECUNET-EXTRA SAVINGS
For smaller business phone users

New EXECUNET Service offers the smaller business-phone user his own private-line network at a price he can afford.

For years government and large business establishments have been making intercity calls at low cost by using their own private-line networks. Until now it has not been economical for the smaller user to have his own private-line network, and he has had to use such expensive methods as WATS or standard long distance toll service. EXECUNET now offers all business-phone users an economical alternative.

EXECUNET, which is a private-line-network that serves the calling areas of the cities on MCI's network, can be extremely beneficial for those businesses whose calling requirements closely match this network. Small business organizations that use EXECUNET can now effectively manage their communications expenses. For example, unauthorized calls are automatically minimized by EXECUNET's special access code, and a detailed breakdown of EXECUNET call activity will be provided to the customer each month.

EXECUNET—EXTRA SERVICES
Designed especially for small businesses

EXECUNET Service is designed to combine maximum economy and convenience for the small business-phone user. When using EXECUNET, the people in your office simply:

- Dial a local phone number (or in the case of a dedicated facility, dial an extension number).
- Dial your company's authorization code.
- You are now in your EXECUNET private-line network.

Access is permitted twenty-four hours a day, seven days a week from any push-button phone in any business office or public phone booth—as long as your authorized access code is entered.

How EXECUNET Service is billed*

Subject to a minimum charge of $75.00 per month plus connection charges, subscribers to EXECUNET private-line service are charged based on actual usage. Examples of EXECUNET rates are shown below:

Service from Washington, D.C. to:	Charge per Minute of Calling Time ($)
Philadelphia	0.14
Pittsburgh	0.15
New York City	0.16
Cleveland	0.18
Detroit	0.20
Chicago	0.24

That's it! There are no long-term commitments and no necessity for special equipment. Compare these rates to your current telephone expenses and you'll see why EXECUNET Service is the most revolutionary communication offering to come along in decades.

MCI Telecommunications Corporation

MCI is regulated by the Federal Communications Commission. MCI has pioneered the concept of competition in the provision of business and data communications service. The MCI network now serves more than twenty major metropolitan areas with a six million channel-mile microwave system. MCI was not only licensed by the FCC to

* See MCI Tariff No. 1 for full information on rates, terms and conditions.

provide a full range of business communications services necessary to meet industry's traditional requirements, but was also chartered to develop new services and markets—EXECUNET is an example of MCI's intention to meet this goal.

Start Saving Today

Call (202) 872-1600 for a personal visit by your MCI representative.

The sooner we talk, the sooner you start saving.

MCI TELECOMMUNICATIONS CORPORATION

COMPARATIVE ANALYSIS OF A 3 MINUTE CALL FROM WASHINGTON—DAY RATES

Called City	EXECUNET	Sta-To-Sta Long Distance	Measured WATS Rates	Operator Assisted Long Distance
Philadelphia	$0.42	$0.96	$0.87 (0.66 O.T.)	$1.40
Pittsburgh	$0.45	$1.02	$0.87 (0.66 O.T.)	$1.50
New York	$0.48	$1.05	$1.08 (0.81 O.T.)	$1.55
Cleveland	$0.54	$1.11	$1.14 (0.87 O.T.)	$1.65
Detroit	$0.60	$1.14	$1.14 (0.87 O.T.)	$1.70
Chicago	$0.72	$1.17	$1.14 (0.87 O.T.)	$1.75
Dallas	$1.11	$1.24	$1.29 (0.96 O.T.)	$1.85
Houston	$1.14	$1.24	$1.29 (0.96 O.T.)	$1.85

Private Line Service Can Be More Economical Than Conventional WATS Or Long-Distance Telephone Service

Comparative Rates For Daytime Calls Originating In Washington

	EXECUNET	PER MINUTE EQUIVALENT					
	PRIVATE LINE SERVICE PER MINUTE	STA-TO-STA LONG DISTANCE		MEASURED WATS RATES		OPERATOR ASSISTED LONG DISTANCE	
CALLED CITY		FIRST MINUTE	EACH ADDITIONAL	FIRST 10 HOURS	O.T.	FIRST 3 MINUTES	EACH ADDITIONAL
Philadelphia	$0.14	$0.42	$0.27	$0.29	$0.22	$1.40	$0.27
Pittsburgh	$0.15	$0.44	$0.29	$0.29	$0.22	$1.50	$0.29
New York	$0.16	$0.45	$0.30	$0.36	$0.27	$1.55	$0.30
Cleveland	$0.18	$0.47	$0.32	$0.38	$0.29	$1.65	$0.32
Detroit	$0.20	$0.48	$0.33	$0.38	$0.29	$1.70	$0.33
Chicago	$0.24	$0.49	$0.34	$0.38	$0.29	$1.75	$0.34
Dallas	$0.37	$0.52	$0.36	$0.43	$0.32	$1.85	$0.36
Houston	$0.38	$0.52	$0.36	$0.43	$0.32	$1.85	$0.36

NOTE: Long distance toll and WATS service provides customers with the flexibility of placing calls to any and all areas within the United States. On the other hand, EXECUNET is a private line service that has been designed to provide the traditional private line economies to customers who call between specific metropolitan areas. EXECUNET private line service can be combined with long distance, toll and/or WATS service to reduce overall communications costs.

NOTE: EXECUNET private line service, unlike long distance toll services, entails a minimal usage charge of $75.00

Appendix

Statement by MCI, and from Commission and Court Briefs and Decisions, Limiting MCI to Private Line Services

From its beginnings, and on innumerable occasions since, MCI has represented to this Commission that it was seeking authority to provide only private line services. It has declared explicitly that it would not provide long distance toll telephone service. Thus in its Comments in Docket No. 18920,* MCI stated:

> ". . . MCI-type applicants propose to *offer only customized point-to-point services* and have no intention of attempting to compete with Bell in *providing local exchange or long distance toll telephone service,* which account for the bulk of Bell's revenues. All of *these are conventional telephone switched voice services, and none of the MCI-type carriers propose such service. . . .*" MCI Comments dated October 1, 1970 in Docket No. 18920, pp. 27-28. (Emphasis added.)

> *"The telephone exchange market is not the market which MCI carriers will enter, however.* These carriers will supply a widely diversified number and level of services for individual customers between two or more points between which they wish to transmit intelligence. *No switching between customers is involved. . . ." Id.* at 167-168. (Emphasis added.)

The Commission has stated explicitly that its authorization to MCI is to provide private line services. The Commission has also emphasized that MCI did not seek au-

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* Specialized Common Carrier Services, 29 F.C.C. 2d 870, *reconsideration denied,* 31 F.C.C. 2d 1106 (1971); *affirmed Washington Utilities and Transportation Commission* v. *FCC,* F.2d (9th Cir. 1975).

thority to furnish services like AT&T's MTS. Thus in Docket No. 19896,† the Commission stated:

> "20. . . . In considering this contention we must first take into account the nature of the MCI and Specialized Common Carrier Services proceedings. In the MCI case the applicant was seeking authorization to engage in the business of *providing interstate private line communications services. . . .*" 46 F.C.C. 2d 413, 424. (Emphasis added.)

In Docket No. 18920 (*supra*), the Commission stated:

> "10. According to MCI, the 'real distinction which delineates MCI service from anything provided today by existing common carriers is . . . the manner in which a customer may utilize it to provide a customized *intra-company point-to-point communications system* of his own design and capability.' . . . *There is, MCI says, 'a distinct difference between a public telephone service—which is a natural monopoly—and a customized communications service offered on a private point-to-point basis.'*" 29 F.C.C. 2d 870, 875-76. (Emphasis added.)

In its brief filed with the Ninth Circuit Court of Appeals reviewing Docket No. 18920** the Commission again emphasized that its previous authorization to MCI (and other specialized common carriers) was limited to only private line service.

The Commission stated:

> "The Commission's decision in this proceeding to allow competition for the provision of specialized com-

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† In the Matter of Bell System Tariff Offerings of Local Distribution Facilities, 26 F.C.C. 2d 143, *affirmed, The Bell Telephone Company of Pennsylvania and AT&T* v. *F.C.C.*, 503 F.2d 1250 (3d Cir. 1974), *petition for cert.* pending.

mon carrier services by qualified carriers *involves essentially private line offerings as distinguished from local telephone exchange and long distance toll telephone service. As such the specialized carriers would not compete with the basic interstate public telephone system of the United States, which is used largely for voice communications.*" p. 4. (Emphasis added.)

The Commission brief filed on April 23, 1975 with the D. C. Circuit Court of Appeal in the pending appeal of the grant of United States Transmission Systems, Inc. application,‡ the Commission reasserted that it had not authorized Specialized Common Carriers to provide long distance service:

"The Commission in 1970 had pending a number of applications for microwave radio facilities, which were to be used for specialized common carrier services in various parts of the country. The applicants proposed to offer a wide range of *private line services. . . . They did not propose to offer ordinary long distance service or wide area telephone service* (WATS)." FCC Brief, *AT&T* v. *FCC et al.*, Case No. 74-1953 (April 23, 1975), pp. 3-4. (Emphasis added.)

"Similarly, the Eastern District of Pennsylvania in *MCI Communications Corp.* v. *AT&T*, 369 F.Supp. 1004, 1027-28, concluded that the Commission's decision in *Specialized Common Carrier Services* 'was to permit competition in all private line services.' . . . The Court, earlier in the opinion, had defined specialized common carrier service as . . . *synonymous with leased line services, as distinguished from public exchange and long distance service.*" *Id.* at 21-22. (Emphasis added.) (Footnote omitted.)

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‡ In Re: *United States Transmission Systems, Inc.*, 48 F.C.C. 2d 859 (1974); *AT&T v. FCC et al., No. 74-1953 (D.C. Cir. 1975).*

The Courts, in affirming prior Commission decision made it equally quite clear that they were proceeding on the premise that MCI was authorized to provide *only* private line services. Thus the Ninth Circuit in its review of the decision in Docket 18920 stated:

> ". . . The business involved is that of *providing specialized private* or leased *line communications* services through microwave transmission facilities, *as distinguished from public exchange and long distance toll telephone service.* The latter consists primarily of voice communication service from and to all points on an integrated national and international telephone network available to the public generally. The proposed service consists of communications of all types of signals, including data. . . ." ——F.2d——. (Emphasis added.)

The Third Circuit in reviewing the decision in Docket No. 19898, likewise understood that only private line services were involved:

> ". . . The Commission first considered *the provision of private line services by specialized common carriers* in *In re Applications of Microwave Communications, Inc.,* 18 F.C.C. 2d 953 (1969) (Docket No. 16509), *reconsideration denied,* 21 F.C.C. 2d 190 (1970). . . . Less than two years later, the FCC conducted a full-scale investigation *into the provision of private line services.*" 503 F.2d 1250, 1254-55. (Emphasis added.)
>
> • • • •
>
> "Secondly, we note that in assessing the extent to which the established carriers' revenues might be diverted by competition from the specialized carriers, the FCC focused upon the *total revenues earned by the established carriers in private line services. We find this focus to be significant. Implicit in the FCC's eval-*

uation is the assumption that the new entrants will provide services similar to those provided by the established carriers within the ruoric of 'private line services.'" Id. at 1260-61. (Emphasis added.)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

June 16, 1975

Mr. William G. McGowan
Chairman of the Board
MCI Telecommunications Corporation
MCI Building
1150 - 17th Street, N. W.
Washington, D.C. 20036

Dear Mr. McGowan:

Your letter of June 9, 1975 comments on the manner in which the Billingsley complaint was handled and the matter of "lobbying" at the Commission. This refers to the recent exchange of correspondence between your company, AT&T and this Commission on the subject of your "Execunet" service.

You express puzzlement as to the prompt response by us in view of our backlogs in other areas (those areas you mention relate to formal proceedings, whereas the matter at hand relates to informal correspondence) and you complain about the manner and depth of presentation by AT&T of its views on Execunet to the members of the Commission and its staff.

Your company filed revisions to its Tariff F.C.C. No. 1 which became effective October 10, 1974. Principally those revisions dealt with your metered use service. A series of meetings were held between members of your staff and members of our staff to clarify a number of questions our staff raised concerning the filing. It was our view that

your proposed revisions were in need of clarification as required by Part 61 of our Rules. These meetings have continued since that time and it is my understanding that your company has a standing commitment to our staff that an "administrative tariff" was to be filed after June 1.

For these reasons, I do not consider our prompt action in this exchange of current correspondence out of the ordinary. The letter of Mr. Billingsley merely highlighted an important problem area already recognized by members of the staff.

Further, during an informal process, I cannot agree with your view that a conversation by a carrier with a member of the Commission or staff automatically entitles another carrier, with an opposing viewpoint, to "equal time." We think the questions posed by AT&T are serious and we are seeking answers to those questions.

As to your point that you wish to be heard on this matter; as you are aware, AT&T has given us its response to your letter of June 5. Upon study of the telephone company's reply, we will determine what course of action to pursue. I trust that this letter serves as a satisfactory reply to you as of this date.

Sincerely yours,

WALTER R. HINCHMAN
CHIEF, COMMON CARRIER BUREAU

MCI TELECOMMUNICATIONS CORPORATION
MCI BUILDING 1150 17TH ST., N.W.
WASHINGTON, D.C. 20036

July 1, 1975

Mr. Walter Hinchman
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Hinchman:

This is in reply to your letter of June 16, 1975 (which was signed for you by Joseph A. Marino) responding to my letter of June 9, 1975 with regard to AT&T's lobbying at the Commission with respect to MCI's Execunet Service. I have been out of Washington for most of the last two weeks and have therefore not had a chance to reply until now.

I am very concerned, in view of trade press reports, that the Commission may act on this matter in the near future, after having really heard only one side of the case. This would not only be unfair to MCI but could have impact on the availability of a desirable new service to the public and on suppliers of the equipment involved—and, indeed, on other service offerings of MCI and other carriers, including Western Union.

I am afraid you have missed the point of my letter. I was *not* referring, in my letter of June 9, 1975, to the exchange of correspondence between MCI, AT&T, and the Commission. Rather, I was expressing concern about what seems clearly to have been a very extensive, off-the-record presentation of AT&T's position to key Commission personnel at a time when AT&T must have known that, if the agency could not be moved to act on its own motion, the Company planned to file a complaint about the matter. I was addressing the fact—of which we keep getting new

evidence—that Bell's position on this issue has apparently been completely pre-sold to the Commission and that MCI should be given a corresponding opportunity to present its case. This is no mere open exchange of correspondence but involves an intense effort to influence the Commission without letting MCI even know that its Execunet service was in question. It was followed by Mr. Billingsley's letter which, as I noted in my earlier letter to you, seemed almost casual—and certainly did not fully reflect the representations which had been made to the Commission earlier. It is redress of that lack of balance that I am seeking.

Furthermore, I think you are in error on the facts as to a number of matters touched on in your letter. The question of Joint Telpak has been a "formal" proceeding only since January 20, 1975 if, indeed, the current proceeding in File No. 3-75 is properly to be classified as "formal". Before that it involved "informal" correspondence and meetings beween MCI and AT&T—and finally the Commission. MCI first discussed the matter with members of the Commission's staff some time prior to December 27, 1973, and thereafter wrote to you on January 30, 1974 asking for assistance and concurring in an AT&T suggestion that discussions of the matter proceed "under the aegis of the FCC". A meeting was held at the Commission on July 26, 1974 and you thereafter wrote to AT&T on July 26, 1974 stating your view that "as long as Telpak is available, and the tariff offers such a joint service to the telegraph company, we believe the offering *must* be made equally to other carriers." (emphasis added). After further correspondence and meetings—but no compliance by AT&T—you wrote again on September 18, 1974 requesting Bell to "promptly revise its Series 5000 offering in Tariff FCC No. 260 to offer Joint Telpak arrangements equally to other carriers." Instead of complying with that directive, AT&T again responded, on October 10, 1974,

with a series of collateral questions—as it had in reply to your original letter. Three months later, on January 9, 1975, AT&T filed a petition asking the Commission to undertake an inquiry into the Joint Telpak arrangement. On January 20, 1975, the Commission, by public notice, requested interested parties to file comments. Such comments have been filed but the Commission has taken no action—though *Telecommunications Reports* for June 30, 1975 states that staff work is proceeding in the matter. Thus the dispute has been "informally" before the Commission since January 30, 1974—and has been more formally under consideration since January 20, 1975.

The other matter I referred to in my earlier letter—AT&T's discriminatory refusal of certain interconnections—has still not been incorporated into any "formal" proceeding. MCI first raised this matter in a Petition for Investigation filed on October 9, 1974, with respect to AT&T's Transmittal No. 12171 dated October 7, 1974. The Commission has not yet ruled on MCI's request. AT&T contended that the matter should be resolved in the negotiations in Docket No. 20099, but it later refused to negotiate the restriction in its Tariff No. 260 to which MCI had objected. After the Docket No. 20099 negotiations were concluded, RCA Global Communications, Inc. filed a Petition for Rejection against the same restriction, as well as others. MCI filed comments in support of RCA's petition. The Commission has not yet acted on RCA's request either, so no formal proceeding has been instituted—and MCI, RCA, and the other carriers disadvantaged by the practices complained of have been given no relief. Thus both of the matters referred to in my letter, though informal in nature, were or have been kept pending for a long time before Commission action—and have not been concluded yet.

Your letter refers to meetings held between members of the Commission's staff and MCI personnel with regard

to our Transmittal No. 16 which revised our tariff to institute metered use service effective October 10, 1974. Those meetings were most helpful and led to our filing Transmittal No. 18 to clarify the footnote on Page No. 39. Application No. 10, which sought special permission to make the change on not less than one day's notice, read in pertinent part as follows:

> After discussion with the Commission staff it has been agreed that the new material outlined on Table IV, 2nd Revised Page No. 39, should be amended to read as follows:
>
> "*The charges shown cover dedicated facilities to a customer's premises. In those cases where a customer's requirement is for a local business telephone line as part of an interstate service, and the customer desires that MCI provide such line, a monthly charge of $15.00 per line will apply in lieu of the charges shown above. Payment of charges incurred for calls dialed through such lines connected to MCI channel is the responsibility of the customer."

I am advised that no other changes in the language of the tariff revisions were requested. As you indicate in your letter, some of the members of your staff stated that our tariff in general, including these revisions—as well as those of AT&T and other carriers—should be clarified, and as a result we have agreed to prepare an administrative glossary that will define certain terms used in MCI's marketing materials but which do not appear in the tariff. We are now finalizing such a glossary and hope to submit it in the near future. We assume that the Commission will require AT&T to do likewise.

However, the conversations about developing a glossary to clarify matters began some time before MCI began marketing the Execunet service, and our early discussions did not involve Execunet at all. They dealt, rather, with

your staff's concern over the fact that MCI's tariff does not contain definitions or explanations of "4K Plus Voice," "FX," "CCSA," and other terms used in marketing our services. This is because, as is explained in Mr. Roberts' reply to Mr. Billingsley, our tariff is constructed on a modular basis rather than in terms of the marketing packages we offer our customers. We want very much to retain that tariff approach because of the flexibility it gives us in serving our customers' needs. We have been told by your staff that they understand this but think a glossary will serve as a bridge between the specific services as they are marketed and the general, modular components set forth in the tariff. We will be happy to comply with their request.

But you are entirely mistaken when, on the basis of the discussions referred to above, you say: "The letter of Mr. Billingsley merely highlighted an important problem area already recognized by members of the staff." Mr. Billingsley did not complain that MCI's tariff provisions as to Execunet are unclear—instead, he objects that we are not authorized to provide the service. On the contrary, the Commission's staff, as noted above, thought that a glossary of marketing terms—later expanded to include "Execunet," "Quickline," etc.—would be helpful, *but they never raised any question about the nature or legality of Execunet wher we briefed them about it at the time of its introduction to the public.* So Mr. Billingsley's concerns originated with him and others at AT&T—though they seem to have raised doubts in the minds of some at the Commission to whom we had not considered it necessary to explain the new service, but to whom we would now like an equal opportunity to state our case.

You close by saying:

> "Further, during an informal process, I cannot agree with your view that a conversation by a carrier with a member of the Commission or staff automatically en-

titles another carrier, with an opposing viewpoint, to 'equal time'."

I used the phrase "equal time" in the sense that I believe we are entitled, in any kind of equitable disposition of this important matter, to a comparable opportunity to present our side of the case before the Commission takes any action which might embark us all upon the kind of lengthy and costly proceeding to which I referred in my letter. Such action would play into AT&T's "deep pocket" strategy because, regardless of the eventual outcome, it would subject MCI to further useless expense and effort and divert our resources from the vital task of establishing ourselves as a viable entity capable of realizing the Commission's objectives in authorizing the entry of new carriers.

I take it that you do not mean to say that we are not entitled to *any* opportunity to present our "opposing viewpoint" during what I assume is still "an informal process." My purpose in writing to you on June 9, 1975 was to assert our right to some response in addition to Mr. Roberts' letter, which could reply only to Mr. Billingsley's very brief and unsubstantiated letter. I sought your assistance in finding out who from AT&T had talked to whom at the Commission and for how long. We need that information to know whom it would be appropriate to ask for an opportunity to state our case—and the scope of presentation that would be appropriate. I also requested your help in getting copies of any materials the AT&T people may have used and a summary of the oral presentations they made because we need that information to know to what it is we are to respond. Procedural fairness would seem to require no less!

I agree that informal discussions between carriers and Commission personnel are desirable and often necessary. But I think the pervasiveness and depth of the presenta-

tions AT&T must have made in this case, on the eve of a planned filing, make this a different matter. I say this because it is obvious from statements made by Commission personnel that AT&T's arguments have had such impact that they have clearly gone beyond normal discussion of problem areas with the Commission and amounted to an all-out adversary presentation—one which is not reflected in Mr. Billingsley's letter and which we cannot meet without being advised of the arguments AT&T made and being given a fair chance to meet with the same people to present our case in rebuttal.

We are preparing a detailed reply to Mr. Scandlyn's letter of June 13, 1975. This is taking some time because we intend to answer it point-by-point and to avoid the kind of generalizations Mr. Scandlyn has used. Meanwhile, we would like to make these very preliminary points:

(1) Section 21.705 of the Commission's Rules provides that:

> "Stations in this service [the Point-to-Point Microwave Radio Service] are authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization. . . ."

(2) In its comments filed in Docket No. 19117, in which the Commission proposed to adopt rules which would require a carrier to get Commission approval before offering a new service, AT&T said:

> "20. A very significant and harmful aspect of the proposed new rules is the extent to which they would curtail or supplant the exercise of the carriers' managerial functions, functions which are of long standing and codified in the Communications Act. The right to initiate and file new or revised classifications of

service, like the right to file rates, is a fundamental prerogative of management, limited only by the requirement that such rates and classifications must be just, reasonable, and nondiscriminatory, *i.e.*, that they must meet the statutory standards of lawfulness. This has been clearly stated by the Supreme Court in intrepreting the Interstate Commerce Act from which the regulatory scheme of the Communications Act was drawn.

'It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in *Int. Com. Com.* v. *Ala. Mid. R. R. Co.*, 168 U.S. 144, 172, quoting from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson of this court, in *Int. Com. Com.* v. *B. & O. R. R. Co.*, 43 Fed. Rep. 37, 50:

' "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." ' *Interstate Commerce Comm'n* v.

Chicago G. W. Ry., 209 U.S. 108, 118-19 (1907); see also *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Comm'n*, 262 U.S. 276, 289 (1922).

"25. The rule changes which the Commission proposes to adopt in this proceeding would be in direct conflict with the statutory scheme under which carriers are free, under § 204 of the Act, to initiate 'any new charge, classification, regulation or practice' by filing a tariff therefor which, subject to the Commission's power of suspension for a maximum period of three months, must be allowed to go into effect unless found, after a hearing, to be unjust, unreasonable, or otherwise unlawful. . . ."

"32. Clearly these proposed rules are antithetical to the statutory scheme and legislative policy outlined above. No longer could a carrier initiate a new service classification or subclassification by filing a tariff with the Commission as authorized by §§ 203 and 204 of the Act. Instead of imposing on the protestants of a new service classification or subclassification the burden of proving it unlawful under § 204 of the Act, the Commission would require a preliminary burden of justification by the carrier. Instead of judging the new filing solely by the standards of lawfulness provided by §§ 204 and 205 of the Act, the Commission would use as its criteria "public interest, convenience and necessity." (Notice, para. 9) Thus, the Commission could pick and choose among new service offerings and reject those it found were not 'in the public interest.' This it lacks statutory authority to do."

In closing out that proceeding without adopting any rule, the Commission said:

". . . we recognize that the termination of the rulemaking proposed herein will make it possible for do-

mestic carriers, as a general rule, to offer new classes or subclasses of communications service over duly authorized facilities merely by the filing of appropriate tariff revisions properly supported by the cost and other data required by Part 61 and otherwise in conformity with our rules. . . ."

(3) MCI duly filed tariff changes last fall which offered a basic metered use service—which is a component of *other* services besides Execunet. No one protested the filing—and *there is, as yet, no written protest sufficient to justify any action with respect to this tariff provision.*

(4) Datran's basic service is a *switched* data service which cannot, by any stretch of the imagination, fit into AT&T's narrow definition of private line service. Western Union offers Hotline, which it presumably classifies as a private line service although its customers do not have dedicated intercity circuits but share a group of intercity private lines—just as the subscribers to Execunet do.

(5) Southern Pacific offers a measured time service, charging subscribers only for actual usage. This can be coupled with a business telephone arrangement in a distant city (such as is used in providing FX service) in order to provide a service very like Execunet.

(6) Composite Data Service Vendors provide a switched service for which they charge in proportion to usage. Are they to be given greater privileges than MCI simply because they lease facilities from AT&T—and are therefore dependent upon it for their continued existence?

(7) In short, the specialized carriers cannot be confined within AT&T's definition of private line

service. It would be unconscionable to allow one competitor to confine another to business areas determined by the former. Before allowing anything of this sort, perhaps the Commission would want to consult with the Antitrust Division of the Department of Justice. The Commission rejected AT&T's narrow definition of private line service in Docket No. 19896 and required interconnection not only for the specialized carriers' presently authorized services but for services authorized "hereafter." In the rapidly changing world of communications, the Commission should preserve that flexibility for the new carriers—and the public.

(8) Many of the aspects of Execunet to which AT&T apparently objects are available to any user of FX or CCSA—whether from AT&T or MCI—who has a PBX switchboard. The FCC classifies this as private line service.

(9) Execunet is a new service—AT&T doesn't offer it. For example, it gives the customer a detailed accounting of calls placed, identified by caller, which Bell can't provide without requiring use of costly operator assistance. The service is valued by its users and is in the public interest.

This is only a very hurried statement of some of the points we want to make to the people who heard AT&T's presentation. The present and foreseeable impact of Execunet on AT&T is *de minimis*, so there is a need for hasty action—especially since the Commission is not in a position to make a rational decision based on full presentation of both sides of the case. This should be permitted before the Commission takes any action, since whatever it may do on partial information seems likely to have serious impact on many parties of whom MCI is only one.

I hope that, on the basis of the above you will use your good offices to facilitate the kind of fair consideration of this matter we are asking—and which I believe the law requires.

Execunet, like Quickline, is a valid service being furnished under a legally filed tariff. These two services, which are both offered under the metered use provision of MCI's tariff, are expected to yield $100,000 in revenue this month—of which Execunet will account for more than $30,000. Despite AT&T's efforts at imposing the kind of contrived and managed competition it has heretofore so often deplored, MCI intends to use all available means to preserve effective competition in the provision of its innovative private line services, including Execunet.

Very truly yours,

WILLIAM G. MCGOWAN
CHAIRMAN OF THE BOARD

APPENDIX C

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-1229

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT
MCI TELECOMMUNICATIONS CORPORATION
IN OPPOSITION

Respondent MCI Telecommunications Corporation ("MCI") [1] hereby submits its brief in opposition to

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[1] Both MCI Telecommunications Corporation and its sister subsidiary, MCI-New York West, Inc., participated fully in the proceedings below. MCI-New York West, Inc., however, has been recently merged into MCI Telecommunications Corporation. "MCI" is utilized throughout this brief to describe either MCI Telecommunications Corporation or the MCI group of affiliated companies.

line services field indicates that FX and CCSA were encompassed within Docket No. 18920. Thus, since the rule-making itself went to the totality of competition in the provision of all private line services (Issue "A"), the generalized interconnection inquiry (Issue "E") also went to work to the totality of private line services, including FX and CCST.[23] (503 F.2d at 1260, Pet. App. 19a)

(2) The Commission, in its decision in Docket No. 18920, considered the possibility of "total diversion" of AT&T's private line revenues as a result of the competition from the specialized carriers. This indicated the Commission's assumption that the new entities would provide services similar to the private line services being furnished by the established carriers. Since FX and CCSA account for a substantial share of AT&T's private line revenues, the reference to total diversion indicates that FX and CCSA were within the Commission's contemplation: (503 F.2d at 1260-61. Pet. App. 19a-22a)

(3) The Commission's directive that it contemplated "full and fair competition in the specialized field among all carriers, both established and new . . ."[24] indicates that the Commission intended the new carriers to provide all elements of the private line services then being furnished by the established carriers, rather than an incomplete "package" of private line services. The Commission's finding that the provision of interstate private line service should be on a full, fair and nondiscriminatory basis would be meaningless without the provision of the full range of private line services. (503 F.2d at 1261-62, Pet. App. 22a-23a)

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[23] As set forth at p. 5, *supra*, it is important to note that AT&T itself classifies FX and CCSA as private line services.

[24] 29 FCC 2d at 916 (1971).

(4) The narrow interpretation sought by petitioners here would frustrate the basic objectives enunciated in the Docket No. 18920 proceeding, in which th Commission repeatedly used the generic term "private line service," which put AT&T on notice that it would be expected to provide interconnections for the full range of such services. The denial of interconnection facilities for the specialized common carriers similar to those provided to AT&T's "affiliated carrier", the Long Lines Department, would place them at a definite disadvantage in obtaining customers and frustrate the Commission's objectives in authorizing entry by the specialized carriers. (503 F.2d at 1262, Pet. App. 23a)

The "evidence" set forth by AT&T in opposition to this conclusion is slim indeed. In order to attempt to rebut the well-reasoned conclusions of the lower court, petitioners rely on ambiguous statements made in Commission briefs in related Ninth and Second Circuit proceedings and on a statement taken out of context from the decision of the court below.

Petitioners (Pet. Brief p. 28) make much of a statement in the Commission's brief filed in the Ninth Circuit, which later affirmed the Commission's decision in the *Specialized Common Carrier Services* case, *Washington Utilities and Transportation Comm'n.* v. *FCC*, Nos. 71-2919 and 72-1198 (9th Cir. Jan. 20, 1975), *rehearing denied*, March 12, 1975. The Commission's brief contained the statement that the *Specialized Common Carrier Services* decision did not contemplate interconnection of the specialized common carriers into

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1953

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

MCI TELECOMMUNICATIONS CORPORATION, and
UNITED STATES TRANSMISSION SYSTEMS, INC., *Intervenors*

BRIEF FOR INTERVENOR
MCI TELECOMMUNICATIONS CORPORATION

STATEMENT OF ISSUE PRESENTED

Whether the Federal Communications Commission, in applying its *Specialized Carrier* policy in favor of full competition in the specialized communications field, abused its discretion in granting the USTS applications.

COUNTERSTATEMENT OF THE CASE

MCI Telecommunications Corporation (MCI) adopts the Counterstatement contained in the brief of the Federal

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Communications Commission, MCI, however, wishes to focus the Court's attention on certain aspects of the factual background of this case.

AT&T's Petition to Deny the USTS applications was part of the broadscale collateral attack on the FCC's decision in *Specialized Common Carrier Services*, 29 FCC 2d 870, *reconsideration denied*, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Utilities & Transportation Commission* v. *FCC*, Nos. 71-2919, 72-1198 (9th Cir., decided Jan. 20, 1975).[1] In the *Specialized Carrier* decision, the FCC had concluded that the public interest would be served by permitting a new competitive entry in the specialized communications field. AT&T's Petition to Deny the USTS applications, dated October 4, 1973, was filed concurrently with a Petition which "request[ed], *inter alia*, that the Commission defer granting *all* pending and subsequently filed specialized common carrier applications pending the holding of an evidentiary hearing to permit the Commission to reassess the question of whether the continued grant of such applications will in fact serve the public interest." AT&T Petition to Deny, p. n. 1 (A. 98) (emphasis added). AT&T "requested that both the substance of the relief requested in said Petition be considered by the Commission in

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mischaracterization of the *Specialized Carrier* decision that AT&T can argue that the application of the policy in favor of competition in the present case "represents a patent departure" from the *Specialized Carrier* decision.

As AT&T would have it, the Commission's *Specialized Carrier* decision "rested directly upon a finding that new

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[1] The *Specialized Carrier* decision applied to terrestrial microwave carriers providing private line services in competition with AT&T. Subsequently, the Commission extended its policy in favor of competitive entry to new satellite carriers. *Establishment of Domestic Communications Satellites by Non-Governmental Entities*, 35 FCC 2d 844 (1972). *See Network Project* v. *FCC*, No.73-2050 (D.C. Cir., decided April 18, 1975).

specialized carriers would primarily provide new services and create new markets and would not significantly divert traffic from existing carriers." That is simply not true. Contrary to AT&T's contention that the "express rationale" of the *Specialized Carrier* decision hinged primarily on a guarantee of "new and different services," the Commission's principal holding in the case shows that the *Specialized Carrier* policy is one of favoring the entry of *new carriers* in *all* private line services. The Commission held as follows, 29 FCC 2d at 920 (emphasis added):

> We find that: there is a public need and demand for the proposed facilities and services and for *new and diverse sources of supply,* competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that *new entry* will have some beneficial effects, and there is no reason to anticipate that *new entry* would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting *new entry.* We further find and conclude that a general policy in favor of the *entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.*

The "policy of in favor of the entry of new carriers in the specialized communication field" was viewed as one of the two "basic determinations" in the matter by the Ninth

Circuit in *Washington UTC, supra,* slip op. at 2, and as the "primary issue" by the Third Circuit in *Bell* v. *FCC, supra,* 503 F.2d at 1270.

The Third Circuit opinion shows further error in AT&T's contention here that the *Specialized Carrier* decision was aimed primarily at promoting "new services"

and discouraging "duplicative facilities." In passing on the question of the extent of competition authorized by the *Specialized Carrier* decision the court noted the Commission's statement that "we do contemplate *full* and fair competition in the specialized field among all carriers, both established and new. . . ." 503 F.2d at 1261; *quoting* 29 FCC 2d at 916 (emphasis added). The court stated, 503 F.2d at 1261-62:

> Given this objective of *full* competition, it is difficult to understand why the Commission would authorize the new carriers to offer an incomplete "package" of private line services. In the absence of any suggestion to the contrary, we read the "full competition" mandate as an indication that *the Commission intended to authorize the new carriers to provide all elements of private line services theretofore furnished by the established carriers.* (emphasis in the second sentence added)

More importantly, the court's opinion specifically rejected AT&T's "new services" reading of the *Specialized Carrier decision,* stating, *id.* at 1262, that: "While there is language in Docket 18920 indicating a concern with new, customized services, we interpret this language as referring not only to the types of services provided, but also to the delivery of private line services to ultimate customers who theretofore had been unable to obtain private line services

fashioned to their particular needs."

The *Specialized Carrier* policy is based on the provision of *all* private line services by *new carriers,* thus assuring *full* competition among all carriers, both established and new. Contrary to AT&T's claim, the Commission's action here is not a departure from the *Specialized Carrier* pol-

icy, but rather an application of that policy. It is AT&T which is pressing for a departure from the policy of full competition. As the Commission stated in its order: "We do not believe the circumstances surrounding the instant applications are sufficient to warrant reevaluation of the open entry policy promulgated in that proceeding." 48 FCC 2d at 860 (A. 282).[6]

This Court has recently affirmed the FCC's grant of authorization to American Satellite Corp. and to RCA Global Communications, Inc./RCA Alaska Communications, Inc. for the provision of specialized communications services via satellite in *Network Project* v. *FCC*, No. 73-2050 (D.C. Cir., decided April 18, 1975). By virtue of the grants affirmed by

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principal issues treated in the *Specialized Carrier* proceeding was spectrum conservation and frequency and route coordination. The decision speaks for itself as to the sufficiency of the Commission's hearing and disposition of that highly technical issue. *See* 29 FCC 2d at 927-36.

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[6] Aside from the above general reaffirmation of the *Specialized Carrier* policy and the refusal to depart from it in the instant case, there is a clear recognition in the Commission's decision here that the grant of the USTS applications is simply a part of the development anticipated in the expert forecasts and judgments made in the *Specialized Carrier* decision. There the Commission discussed the financial risk aspects of the new competitive policy, and noted that possible mergers and changes of service suppliers were part of a "reasonable price to pay for competitive options." 29 FCC 2d at 922. Here the Commission took note of its prior forecasts and the "effective screening mechanism of the risk capital money market" and found that "ITT's proposed entry into the field is not inconsistent with this 'shake out' period which represents, we believe, the natural outgrowth of the competitive policies developed for specialized common carrier services." 48 FCC 2d at 861 (A. 283).

AT&T's third allegation is that the USTS system may divert up to $30.5 million of AT&T's private line revenues annually and that this presents a material factual issue which requires an evidentiary hearing.

In the *Specialized Carrier* case, the Commission rejected this notion that "there could be any diversion of revenues of a magnitude to have the impact claimed by AT&T, in view of the very small percentage of AT&T's existing total market that is vulnerable to competition of the kind proposed here, the growth rate of Bell's basic services, and the likelihood that AT&T would obtain a very substantial share of the potential market for specialized services." 29 FCC 2d at 910. As to the share of AT&T's total market, where private line diversion might occur, the Commission found that only about 4 percent of total Bell system revenues comes from interstate private line services that would be subject to competition, and that the percentage would not appreciably increase over the decade even with the expected fourfold growth of the existing plant of the Bell system. *Id.* at 911. Next, the Commission found that any diversion would not be significant because of the rapid growth and specialized needs of the private line market.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1386

The Bell Telephone Company of Pennsylvania

and

The American Telephone and Telegraph Company,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

AND

THE UNITED STATES OF AMERICA,
Respondents.

MCI Telecommunications Corp., *et al.*,
Intervenors.

On Petition for Review of a Decision
of the Federal Communications Commission

Brief for Intervenors
MCI Telecommunications Corporation and
MCI-New York West, Inc.

JURISDICTION

This proceeding is brought pursuant to 28 U.S.C. §§ 2341-50 and Section 402(a) of the Communications Act,

47 U.S.C. § 402(a), which establish this Court's jurisdiction. The Decision of the Federal Communications Commission sought to be reviewed constitutes final agency action.

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even if its applications were granted. The concentration, therefore, was on such interconnection services. A. 1124-25)

(b) *The Specialized Common Carrier* proceedings involved rulemaking for the determination of basic policies with respect to the provision of private line service by all the specialized carriers.[22] FX

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[22] Petitioners (Pet. Br., p. 36) refer to the Commission's brief in the Ninth Circuit in *Washington Utilities and Transportation Comm.* v. *FCC*—the appeal from the Commission's *Specialized Common Carrier* decision. They argue that the concession is made in that brief that the *Specialized Common Carrier* decision did not contemplate interconnection of the specialized common carrier into the switched network. As has previously been pointed out (p. 28, n. 15, *supra*) the appeal in the Ninth Circuit did not involve the matter of interconnection. *The brief's reference to interconnection was thus somewhat gratuitous and entirely peripheral to the issues raised on appeal.* In any event the Commission in its Decision in Docket No. 19896 (A. 1125, n. 14) instructed its counsel to forward a copy of the Decision to the Ninth Circuit to dispel any ambiguity that the brief may have created. Petitioners (Pet. Br., p. 37) also refer to a statement in the Commission's pleading the Second Circuit case (which was an appeal from the Commission's letter order of October 4, 1973). In his brief the General Counsel said that the Commission *could* rule in Docket No. 19896 that it was never its intention to allow MCI to provide FX or CCSA service or that there had been no Section 201(a) hearing. The Show Cause Order initiating *this* proceeding included an issue as to whether "the Commission has heretofore ordered the telephone companies, pursuant to Secton 201(a) of the Communications Act, to provide interconnection with MCI. . . ." (A. 140); the statement simply set forth an academically possible result. That possibility of course did not eventuate.

and CCSA were not specifically mentioned because the Commission was concerned with private life services generally and did not focus on any specific form of service. However, it is clear that FX and CCSA were directly involved from the fact that Bell in its comments in that proceeding specifically listed FX as a private lineservice and CCSA as equipment available to its private line customers and has consistently classified FX and CCSA as private line services in its tariffs and other documents. Moreover, the Commission in its Decision in Docket No. 18920 considered the possibility of the "total diversion" of Bell's private line revenues as a result of the competition offered by the specialized carriers. Since FX and CCSA account for a substantial share of Bell's total private line revenues, the reference to total diversion would have been meaningless if FX and CCSA were not to be included in the specialized carriers' service offerings. There is no distinction in principle to separate FX and CCSA services from other types of interconnection. (A. 1125)[23]

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(c) The October 4, 1973 letter order did not specifically refer to FX and CCSA but did cover "*all*

[23] Petitioners (Pet. Br., pp. 35-36) seek comfort in a line of questions propounded by Commissioner Wiley during the oral argument in Docket No. 19896, in which he inquired as to why FX and CCSA were not specifically mentioned in the *Specialized Common Carrier* proceeding. The short answer to Petitioners' point is that these are the types of questions frequently used to elicit information and to bring disputed issues into focus. Commissioner Wiley's questions were answered during the oral arguement (A. 926-27; A. 931-32), and he was obviously satisfied since he voted in favor of the Decision, which interpreted the order in the *Specialized Common Carrier* proceeding as comprehending FX and CCSA.

of the authorized services of the specialized carriers." (emphasis added) The directive in that letter requiring the telephone companies to honor requests for interconnection facilities required by the specialized carriers to terminate the services they are authorized by the Commission to furnish was certainly broad enough to encompass interconnection for FX and CCSA services. (A. 1125)

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(d) The narrow interpretation which Bell seeks to place on the previous rulings would be inconsistent with the basic objectives enunciated in those proceedings. In each of the proceedings action was taken to assure that the provision of interstate private line service would be on a full, fair and nondiscriminatory basis [24] and that the specialized carriers would not be excluded from the market by reason of monopoly control by Bell and other telephone companies over essential local distribution facilities. Such interconnection is provided by the telephone companies to the Long Lines Department and to more than 1,700 independent telephone companies to enable

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[24] In Docket No. 18920 the Commission made it clear that AT&T, Western Union and other existing carriers would have an opportunity to compete with new entrants on the merits of their own service offerings and facilities, that there should not be any protective unbrella for new entrants, and that competition in the specialized field should be full and fair among all carriers, both established and new (29 FCC) 2d at 913-14, 915, 916). The policy thus enunciated does not restrict the scope of AT&T'S activities. AT&T would, however, have it operate as a one way street, in its favor, but not for the benefit of the specialized carriers. In other words, it wants to compete with respect to any new services the specialized carriers may develop but seeks to exclude the specialized carriers from a substantial part of the basic private line market.

them to provide FX and CCSA services. The denial of similar facilities to the specialized carriers would place them at a definite disadvantage in obtaining customers and would frustrate the objectives sought to be achieved by the authorizations granted to the specialized carriers by the Commission. (A. 1127)

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The Commission's second answer to Petitioner's contentions that FX and CCSA were not contemplated by its prior orders, is, that even though the matter had been fully and clearly provided for by earlier determinations, the Commission nevertheless proceeded in Docket No. 19896 to address itself to the arguments strenuously advanced by Bell that substantial and significant differences exist between interconnection for FX and CCSA and interconnection for other private line services[25] and that by reason of these differences an evidentiary hearing is essential. The Commission addressed itself specifically to the reasons asserted to require such an evidentiary hearing and found that no basis existed therefor. Its findings may be summarized as follows:

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[25] In light of this argument it is ironic to note that Bell is somewhat less than consistent in its position. In the mandamus proceeding in the District Court for the Eastern District of Pennsylvania (369 F. Supp. 1004) the record shows that not only did Bell refuse to interconnect for FX and CCSA but likewise refused interconnection for "interexchange service"—clearly not a switched service even by Bell's definition. In that case AT&T indicated that such interconnection would be available only if and when the Commission approves AT&T's Hi-Lo tariff. The approval of the tariff has no bearing whatsoever on MCI's right to interconnection—it may relate to the economics of competition. (See 369 F. Supp. at 1009-10.)

III.

The Commission's Order Is Clear and Precise. It Is Not Overbroad.

The Commission in its Order has directed the Bell companies to furnish to MCI and other specialized common carriers the interconnection facilities essential to the rendition of all their presently or hereafter authorized interstate and foreign communications services. (A. 1146-47) Petitioners urge (Pet. Br. 46-50) that aside from interconnection for FX and CCSA the obligation imposed by the Commission is wholly undefined and unrestricted—that the Decision offers no guidance whatever as to the character or extent of any additional services to which the interconnection obligation may be intended to extend. They charge that the Order is impermissibly sweeping.

Petitioner's argument is specious—there is no problem of overbreadth in the Commission's Order. For while it is correct that the Commission's language requires Bell to permit physical connections "essential" for "all" of the private line services which any of the specialized carriers are now or may "hereafter" be authorized to offer, the obligation is qualified and limited by the duty set forth in the Decision that such interconnection facilities must be *"similar to these presently provided to Bell's Long Lines Department on a nondiscriminatory basis."* (A. 1146) Similarly, while it is also true that the Decision orders Bell to cease and desist from "any conduct" which may result in denying or delaying physical connections for any such services now or "hereafter" authorized, this obligation is limited by the concurrent obligation imposed on Bell to cease and desist from "denying to MCI or any other carrier party reasonable interconnection services similar to those provided to the Long Lines Department of the American

Telephone and Telegraph Company in connection with the authorized interstate and foreign communications services of such other carriers." (A. 1146)

MCI and the other specialized carriers have asked the Commission *only for equality of treatment with the Long Lines Department,* Western Union and the independent telephone companies, and the Commission has reiterated the necessity for equal treatment again and again throughout these proceedings. The interconnection obligation imposed by the Decision in Docket No. 19896, as had been made clear by the various prior proceedings, goes to fair competition, and competitive equality of opportunity with respect to interconnection as a necessary corollary to the basic public interest finding in Docket No. 18920 authorizing specialized common carriers to compete in the private line field. This is illustrated by the fact that in the *Notice* in Docket No. 18920, the Commission stated (24 FCC 2d at 347):

> "In other words, where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor or [sic] an affiliated carrier or show favoritism among competitors." (Footnote omitted)

In the *Specialized Common Carrier* decision, the Commission stated (29 FCC 2d at 940):

> "We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier.

> Moreover, as there stated, 'where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors.'" (Footnote omitted)

In the October 4, 1973 letter, the Commission stated (A. 29):

> "[O]ur *MCI* and *Specialized Common Carrier* decisions made it clear that Bell System companies and other established carriers which have monopoly control of exchange facilities would be expected to provide, on reasonable terms and conditions, interconnection of such facilities as required by the specialized carriers to terminate the services which such

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APPENDIX C

Pertinent Provisions of the Communications Act of 1934

Section 202, 47 U.S.C. § 202, provides:

> (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class or persons, or locality to any undue or unreasonable prejudice or disadvantage.
>
> (b) Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.
>
> (c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

Section 203, 47 U.S.C. § 203, provides:

> (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or

points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in

any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d)The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, § 203, 48 Stat. 1070.

Section 204, 47 U.S.C. § 204, provides:

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission

may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification,

regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

Section 205, 47 U.S.C. § 205, provides:

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make any order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Section 214, 47 U.S.C. § 214, provides:

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Pro-*

vided, however, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this sec-

tion may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

Section 301, 47 U.S.C. § 301, provides:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory

or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

Sections 303(a) and 303(b), 47 U.S.C. §§ 303(a) and 303(b), provide in pertinent part:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> (a) Classify radio stations;
>
> (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

Section 307, 47 U.S.C. § 307, provides:

> (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limi-

tations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) Omitted.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Con-

sistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

(e) No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license.

Section 308, 47 U.S.C. § 308, provides:

(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: *Provided*, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon

such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country,

may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title.

Section 309, 47 U.S.C. § 309, provides:

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application—

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Subsection (b) of this section shall not apply—

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for—

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for a grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325 (b) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or

denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing

subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant for a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405 of this title.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to

operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title.

MCI Statements in FCC Dockets and Related Court Proceedings Establishing That MCI Sought Authority Only To Provide Private Line Services

Docket Nos. 16509-16519[•]

"64. MCI proposes to furnish essentially the same type of service as that of *private* microwave systems, with the basic difference that MCI would render the service on a common carrier basis. MCI would install the basic microwave system on its route ('the pipe') and allow its customers to use parts of its [MCI Ex. 1]." MCI Proposed Findings of Fact and Conclusions of Law, F.C.C. Docket Nos. 16509-16519 (July 28, 1967), p. 27. (Emphasis added.)

"458. MCI will *not provide a toll exchange telephone service* or a message telegraph service. MCI will provide only microwave channels to be used only for interoffice and interplant communication [MCI Ex. 1, Tariff No. 1, p. 4]." *Id.* at 148. (Emphasis added.)

"6. MCI emphasizes that it is *not seeking to become a public telephone exchange company* or a public message telegraph company. . . ." *Id.* at 196. (Emphasis added.)

"7. *MCI would not offer public telephone exchange services, that is, MCI customers would not use MCI facilities to call any member of the general public. . . .*" *Id.* at 197. (Emphasis added.)

• • • • •

"6 . . . . the basic MCI and existing carrier systems are different. The existing carriers have large plants originally dedicated to and designed for general telephone exchange service or message telegraph service. MCI will not operate in these services. . . ." MCI

[•] In Re Microwave Communications, Inc., 18 F.C.C.2d 953 (1969) *reconsideration denied*, 21 F.C.C.2d 190 (1970).

Reply Brief, F.C.C. Docket Nos. 16509-16519 (January 15, 1968), p. 4.

"37. The latent need for service in these sub-markets has little relation to present private line services and *no relation to present telephone* and telegraph *services* since all those who use MCI's special services will still use Bell for telephone and Western Union for telegraph. . . ." *Id.* at 19. (Emphasis added.)

• • • • •

"1. . . . The Commission granted MCI's applications for a wholly new concept of non-telephone service which is best described as private, intra-firm customized communications channels . . . . *This is not a telephone exchange service.* . . ." MCI Opposition to Petitions for Reconsideration, F.C.C. Docket Nos. 16509-16519 (October 7, 1969), pp. 1-2. (Emphasis added.)

"26. . . . *MCI is not offering a public switched telephone service. It cannot and will not have any effect on the public switched telephone network* . . . ." *Id.* at 14. (Emphasis added.)

"28. . . . MCI is offering communication channels not obtainable from Bell. . . ." *Id.* at 14.

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". . . It has not proposed a new type of service; that is, *it has not proposed to enter the telephone exchange service,* the telegraph business, the cable business, or any service other than the originally conceived *MCI* service." MCI's Opposition to Petitions to Deny,* F.C.C. Docket Nos. 16509-16519 (May 22, 1970), p. 5. (Emphasis added.)

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* In Re Application of Microwave Communications, Inc. for Modification of Construction Permits, 27 F.C.C.2d 380 (1971).

Docket No. 18920[*]

". . . MCI-type applicants propose to *offer only customized point-to-point services* and have no intention of attempting to compete with Bell in *providing local exchange or long distance toll telephone service,* which account for the bulk of Bell's revenues. All of *these are conventional telephone switched voice services, and none of the MCI-type carriers propose such service.* . . ." MCI Comments, F.C.C. Docket No. 18920 (October 1, 1970), pp. 27-28. (Emphasis added.)

". . . The exchange services offered by the telephone company are not similar in any way to the services which the Specialized Common Carriers propose to provide. . . . *Specialized Common Carriers will provide only specialized point-to-point private line services.*" *Id.* at 102-03. (Emphasis added.)

"The telephone exchange market is not the market which MCI carriers will enter, however. These carriers will supply a widely diversified number and level of services *for individual customers between two or more points* between which they wish to transmit intelligence. *No switching between customers is involved* . . . ." *Id.* at 167-68. (Emphasis added.)

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"Furthermore, as is demonstrated elsewhere, we and the other applicants propose to serve a new submarket within the point-to-point communications market . . . . The 'cream' is in its switched voice services where it earns its highest returns—and which we do not seek to enter." MCI Reply Comments, F.C.C. Docket No. 18920 (December 2, 1970), p. 27.

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[*] Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971), *reconsideration denied,* 31 F.C.C.2d 1106 (1971); *affirmed* Washington Utilities and Transportation Commission v. F.C.C. 513 F.2d 1142 (9th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3206 (Oct. 1975).

"The Task Force (President's Task Force Report on Communications Policy) found 'it useful to distinguish between the public message telephone service, and leased line or private line service.' " Brief of MCI at p. 9 in *Washington Utilities Transportation Commission* v. *F.C.C.*, 513 F.2d 1142 (9th Cir. 1975). (Parenthetical phrase added.)

"The only point of direct competition with Bell would be in the area of private line services." Id. at 33. (Emphasis added.)

Docket No. 19896•

". . . FX and CCSA are merely two of the types of private line services which customers of the specialized carriers are entitled to avail themselves of when they choose to use specialized carrier facilities instead of going to AT&T for all their needs." MCI Brief, F.C.C. Docket No. 19896 (January 21, 1974), p. 40.

". . . *Docket No. 18920 dealt with private line services* —all of them—and the question of whether the business and data customers using Bell's and Western Union's various services would benefit from competition this limited corner of the overall common carrier communications market." *Id.* at 43. (Emphasis added.)

". . . Rather, *the discussion* (in Docket No. 18920) *was about the private line services generally*—sometimes referred to as business and data services—without specific reference to particular sub-classifications or configurations or terminals or any other restrictive nomenclature. In fact, in assessing the existing car-

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• Bell System Tariff Offering, 46 F.C.C.2d 413 (1974), *aff'd sub nom.* The Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied,* 43 U.S.L.W. 2660 (June 16, 1975).

riers' claims of adverse impact from specialized carrier competition, the Commission discussed the possibility—which it labeled as extremely remote—that *all* of their private line revenues might be diverted to the new carriers. That must have meant, of course, that the Commission intended that the specialized carriers were to be allowed to compete for *all* of that business —including FX and CCSA." *Id.* at 43, 44. (Emphasis added.) (Parenthetical phrase added.)

". . . The Commission knew that if the new carriers were ever to become viable and offer innovative services they would *need to share the private line market* already being serviced by AT&T and Western Union. Since the Order discussed Bell's total private line market and revenues throughout, it is obvious that everyone was to be allowed to compete for every service—including FX and CCSA. *Id.* at 46. (Emphasis added.)

• • • • •

". . . And all that is required to achieve the Commission's objective is that Bell comply with the Commission's directives in the *MCI* case and in Docket 18920 that all the existing carriers should provide interconnection to the new carriers for the *whole broad range of private line services.*" MCI Reply Brief, F.C.C. Docket No. 19896 (February 4, 1974), p. 5. (Emphasis added.)

". . . FX and CCSA together amount to $420 million of Bell's interstate private line business—a substantial market which it obviously wants to keep for itself, *despite the Commission's decision to authorize competition in the private line* field and the orders for interconnection it has issued to implement that decision." *Id.* at 9. (Emphasis added.)

". . . While the Commission concluded that it was feasible and desirable to have competing intercity systems

for *the provision of private line service to business and data users, no one proposed—or authorized—the new carriers to duplicate the telephone companies' local exchange networks.*" *Id.* at 10. (Emphasis added.)

"First, the FCC brief said that the FCC's *Specialized Carrier* decision '. . . *involves essentially private line offerings as distinguished from local telephone exchange and long distance toll telephone services.*'" *Id.* at 14. (Emphasis added.)

"The Commission knew that if the new carriers were ever to become viable and offer innovative services, they would need to share the private line markets already being serviced by AT&T and Western Union." *Id.* at 17.

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"The basis for this determination may be briefly summarized as follows:

> "(a) The *MCI* case involved *applications for authorization to engage in private line communications services.* . . .
>
> "(b) The *Specialized Common Carrier* proceedings involved rule making for the determination of basic policies with respect to the *provision of private line service* by all the specialized carriers." Brief of MCI, pp. 36, 37 in Bell Telephone Company of Pennsylvania and AT&T v. F.C.C., 503 F.2d 1250. (Emphasis added.)

"For while it is correct that the Commission's language requires Bell to permit physical connections 'essential' for 'all' of the *private line services which any of the specialized carriers are now or may 'hereafter' be authorized to offer.* . . ." *Id.* at 52. (Emphasis added.)

Application of USTS•

"The Specialized Carrier decision opened up to full competition *all of AT&T's private line services.*" MCI Brief, *AT&T* v. *F.C.C. et al.*, Case No. 74-1953 (April 1975), p. 6. (Emphasis added.)

". . . Contrary to AT&T's contention that the 'express rationale' of the *Specialized Carrier* decision hinged primarily on a guarantee of 'new and different services,' the Commission's principal holding in the case shows that the *Specialized Carrier* policy is one favoring the entry of *new carriers* in *all* private line services." *Id.* at 17.

"The *Specialized Carriers* policy is based on the provision of *all* private line services by *new carriers* . . . ." *Id.* at 19.

"This necessarily meant, of course, that the specialized carriers were to provide *all the private line services of the existing carriers* rather than be confined primarily to new services." *Id.* at 39. (Emphasis added.)

"Thus, since the Commission has considered the possibility of diversion of the whole of the private line market and found that an insufficient reason to bar competitive entry. . . ." *Id.* at 40.

• In Re: United States Transmission Systems, Inc. 48 F.C.C.2d 859 (1974); AT&T v. F.C.C. et al., No. 74-1953 (D.C. Cir. 1975).

Statements of the Commission in FCC Dockets and Court Related Cases Establishing That It Authorized MCI Only To Provide Private Line Services

*Docket No. 16509**

"MCI is offering a service intended primarily for interplant and interoffice communications with unique and specialized characteristics." 18 F.C.C.2d 953 at 960.

"MCI proposes to offer its subscribers limited common carrier microwave radio service, designed to meet the interoffice and interplant communications needs of small businesses." 18 F.C.C.2d 953 (1969).

*Docket No. 18920***

"1. The MCI carriers and others *all propose point-to-point facilities for private line services* including, but not limited, to data transmission." 29 F.C.C.2d 870, 871. (Emphasis added.)

"7. There are also pending applications by 17 MCI associated companies for portions of a proposed nationwide network *to provide specialized private line communications services. . . .*" *Id.* at 874. (Emphasis added.)

"10. According to MCI, the 'real distinction which delineates MCI service from anything provided today by existing common carriers is . . . the manner in which a customer may utilize it in order to provide a customized *intra-company point-to-point communications system* of his own design and capability.' . . . There is,

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* In Re Microwave Communications, Inc., 18 F.C.C.2d 953 (1969), *reconsideration denied,* 21 F.C.C.2d 190 (1970).

** Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971), *reconsideration denied,* 31 F.C.C.2d 1106 (1971); *affirmed* Washington Utilities Transportation Commission v. F.C.C., 513 F.2d 1142 (9th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3206 (Oct. 1975)

MCI says, 'a distinct difference between a public telephone service which is a natural monopoly and a customized communications service offered on a private point-to-point basis.' " *Id.* at 875, 876. (Emphasis added.)

"11. . . . While varying in detail, in general all of these applicants—*like the MCI carriers—propose to provide specialize* [sic] *private line services* tailored to the requirements of the subscriber." *Id.* at 876. (Emphasis added.)

"31. . . . Moreover, the showings in the MCI applications . . . support the view that there is widespread interest in the types of specialized, *private line services* proposed by it and other applicants." *Id.* at 882. (Emphasis added.)

". . . For example, AT&T's present interstate business constitutes only about 30 percent of the Bell System's total business; about 87 percent of the interstate revenue is from message toll telephone and wide area telephone service (WATS), and these later services have an annual growth rate of about 15 percent. *None of the applicants proposes to provide this type of service* and we see no reason to expect any undesirable effects upon these services." *Id.* at 885. (Emphasis added.)

"The MCI carriers and others all *propose point-to-point facilities for private line services* including, but not limited, to data transmission." *Id.* at 871. (Emphasis added.)

"There are also pending applications by 17 MCI associated companies for portions of a proposed nationwide network to *provide specialized private line communications services.*" *Id.* at 874, 875. (Emphasis added.)

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"The Commission's decision in this proceeding to allow competition for the provision of specialized common carrier services by qualified carriers involves essentially *private line offerings as distinguished from local telephone exchange and long distance toll telephone services.* As such the specialized carriers would not directly compete with the basic interstate public telephone system of the United States, which is used largely for voice communications." FCC Brief, p. 4-5 in *Washington Utilities Transportation Commission* v. *F.C.C.*, 513 F.2d 1142 (9th Cir. 1975). (Emphasis added.) (Footnote omitted.)

"Many applicants, such as intervenors MCI, Southern Pacific, Interdata, etc., sought *permission to construct point-to-point microwave facilities solely for the provision of private line communication services. It was made clear that their facilities would not be connected with the interstate telephone network of AT&T, although many applicants would require connection with local telephone companies in order to obtain local distribution* (*i.e.*, from the microwave terminal to a customer's premises)." *Id.* at 8-9. (Emphasis added.)

". . . The new specialized companies are offering business and institutional users a choice of diverse services of stated quality (either higher or lower than that of the telephone company) that is solely for the purpose of meeting the needs of users for specialized communications between or among a given number of points." *Id.* at 43.

"Significantly the specialized service market is but a small fraction of the total communication market, *which is made up principally of the demand for Bell's public telephone service with which the specialized applicants will not compete.*" *Id.* at 50. (Emphasis added.)

Docket No. 16495[•]

"In encouraging multiple only and the development of competition in the supply of domestic communications, *we have maintained a distinction between the so-called monopoly switched telephone services now being furnished by AT&T and all other classes of existing and potential specialized services.*" 35 F.C.C.2d 844, 853. (Emphasis supplied.)

Docket No. 19896[•]

"5. *The specialized common carrier parties provide private line services to their subscribers* and are engaged in the transmission of communications, voice, data, or both, between a point in one state and a point in another state and/or a foreign country, i.e., interstate or foreign communications." 46 F.C.C.2d 413, 416. (Emphasis added.)

"9. In the original MCI case, which was an adjudicatory proceeding involving applications for authorizations to construct facilities *to provide a common carrier private line microwave* radio service between Chicago, Illinois and St. Louis, Missouri . . . ." *Id.* at 419. (Emphasis added.) (Footnote omitted.)

"From the above, as well as from a reading of the entire Notice, it is apparent that, although the Commission made reference to loop service, as Bell asserts, it

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[•] In the Matter of Establishment of Domestic Communications Satellite Facilities by Non-Government Entities, Second Report and Order, 35 F.C.C.2d 844 (1972), Memorandum Opinion and Order, 38 F.C.C.2d 665 (1972).

[•] In the Matter of Bell System Tariff Offerings of Local Distribution Facilities, 46 F.C.C.2d 143 (1974), *affirmed* The Bell Telephone Company of Pennsylvania and AT&T v. F.C.C., 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 44 U.S.L.W. 3205 (Oct. 1975).

was never intended to limit the scope of the inquiry to loop service. *Rather, a broader inquiry into the local distribution of the interstate private line common carrier services proposed by the new carriers was contemplated.*" *Id.* at 421. (Emphasis added.)

"20. . . . In considering this contention we must first take into account the nature of the MCI and Specialized Common Carrier Services proceedings. In the MCI case the applicant was seeking *authorization to engage in the business of providing interstate private line communications services . . . .*" *Id.* at 424. (Emphasis added.)

"22. . . . In each of the proceedings discussed above, our action was taken to insure that competition in *the provision of interstate private line communications* services would be on a full, fair, and non-discriminatory basis. . . . However, we have held on the basis of extensive hearings in adjudicatory and rule making proceedings that the public will be benefitted by the entry of the specialized carriers into *the private line common carrier field* and that the public interest will be served by competition on a fair and non-discriminatory basis." *Id.* at 426. (Emphasis added.)

Applications of USTS•

"The Commission in 1970 had pending a number of applications for microwave radio facilities, which were to be used for specialized common carrier services in various parts of the country. The applicants proposed to offer a wide range of *private line services. . . . They did not propose to offer ordinary long distance service or wide area telephone service* (WATS)." FCC Brief,

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• In Re: United States Transmission Systems, Inc., 48 F.C.C. 859 1974); AT&T v. F.C.C. et al., No. 74-1953 (D.C. Cir. 1975).

AT&T v. *F.C.C. et al.*, Case No. 74-1953 (April 23, 1975), pp. 3-4. (Emphasis added.)

"The open entry policy covered the full range of private line services. . . ." *Id.* at 7.

". . . The Court interpreted the Commission's policy broadly as approving open entry into the entire field of private line services. . . ." *Id.* at 8.

". . . But it was evident from the beginning that the Commission was opening the full range of private line services to competition." *Id.* at 21.

"Similarly, the Eastern District of Pennsylvania in *MCI Communications Corp.* v. *AT&T*, 369 F. Supp. 1004, 1027-28, concluded that the Commission's decision in *Specialized Common Carrier Services* 'was to permit competition in all private line services.' . . . The Court, earlier in the opinion, had defined specialized common carrier service as . . . *synonymous with leased line services, as distinguished from public exchange and long distance service.*" *Id.* at 21-22. (Emphasis added.) (Footnote omitted.)

Third Circuit Quotations Establishing That MCI Was Granted Authority To Only Provide Private Line Service

". . . Specifically, the first two paragraphs of the order (¶ 53-54) require the American Telephone and Telegraph Company and affiliated Bell System companies (hereinafter "A T & T") to furnish to MCI Telecommunications Corp. (MCI) and to all other specialized common carriers the interconnection facilities necessary to provide *private line services.*" 503 F.2d 1250, 1254. (Emphasis added.)

". . . The Commission first considered *the provision of private line services by specialized common carriers* in *In re Applications of Microwave Communications,*

Inc., 18 F.C.C.2d 953 (1969) (Docket No. 16509), *reconsideration denied*, 21 F.C.C.2d 190 (1970). . . . Less than two years later, the FCC conducted a full-scale investigation into the provision of private line services." *Id.* at 1254-55. (Emphasis added.)

". . . In short, before reaching the issue of local distribution (issue "E"), the Commission proposed to consider a more general topic: entry of new carriers into the private line service field." *Id.* at 1260.

". . . Implicit in the FCC's evaluation is the assumption that the new entrants will provide services similar to those provided by the established carriers within the rubric of 'private line services.' " *Id.* at 1260-61.

". . . As we have previously discussed, the Commission focused upon the *full field* of private line services theretofore provided by the established carriers. The Commission's evaluation demonstrated that the public interest favored the entry of specialized carriers into the full field of *private line services.*" *Id.* at 1270. (Emphasis added.)

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"The Commission's efforts to *improve private line services by permitting specialized carriers to enter the market* helped generate the controversy presently before this court." Brief of FCC, p. 8, filed in *Bell Telephone Company of Pennsylvania and AT&T* v. *F.C.C.*, 503 F.2d 1250. (Emphasis added.)

"While MCI's initial application was in protracted hearings, numerous applications were filed with the Commission by specialized common carriers also seeking to enter the private line communications field." *Id.* at 11.

". . . Thereafter the Commission concluded that the public would not be harmed even assuming that AT&T lost all its private line services. . . ." *Id.* at 13.

"After an extensive rulemaking proceeding into the broad question of *competition in private line services* . . . . *Id.* at 27. (Emphasis added.)

". . . New obligations might be created for existing carriers as well as for the applicants, and the long-standing policy of permitting monopoly provision of private line communication service was challenged." *Id.* at 32.

". . . For purposes of this proceeding, we submit that the proper dichotomy is between private line services and the basic interstate public telephone system. . . ." *Id.* at 40.

"Throughout the various proceedings concerning the specialized common carriers, it was clear that the Commission was contemplating the entire range of private line services." *Id.* at 41.

"The *Specialized Common Carrier Services* proceeding involved rulemaking for the determination of basic, broad policies with respect to provision of the full range of private line services. . . ." *Id.* at 41, 42.

". . . The Commission has tried to insure that competition in the provision of interstate private line services will be on a full, fair, and non-discriminatory basis. . . ." *Id.* at 45.

"In summary, throughout this entire tripartite proceeding (MCI; Specialized Common Carriers; AT&T Tariff Offerings), the Commission has been considering the question of competition over the full range of private line common carrier services." *Id.* at 48. (Emphasis added.)

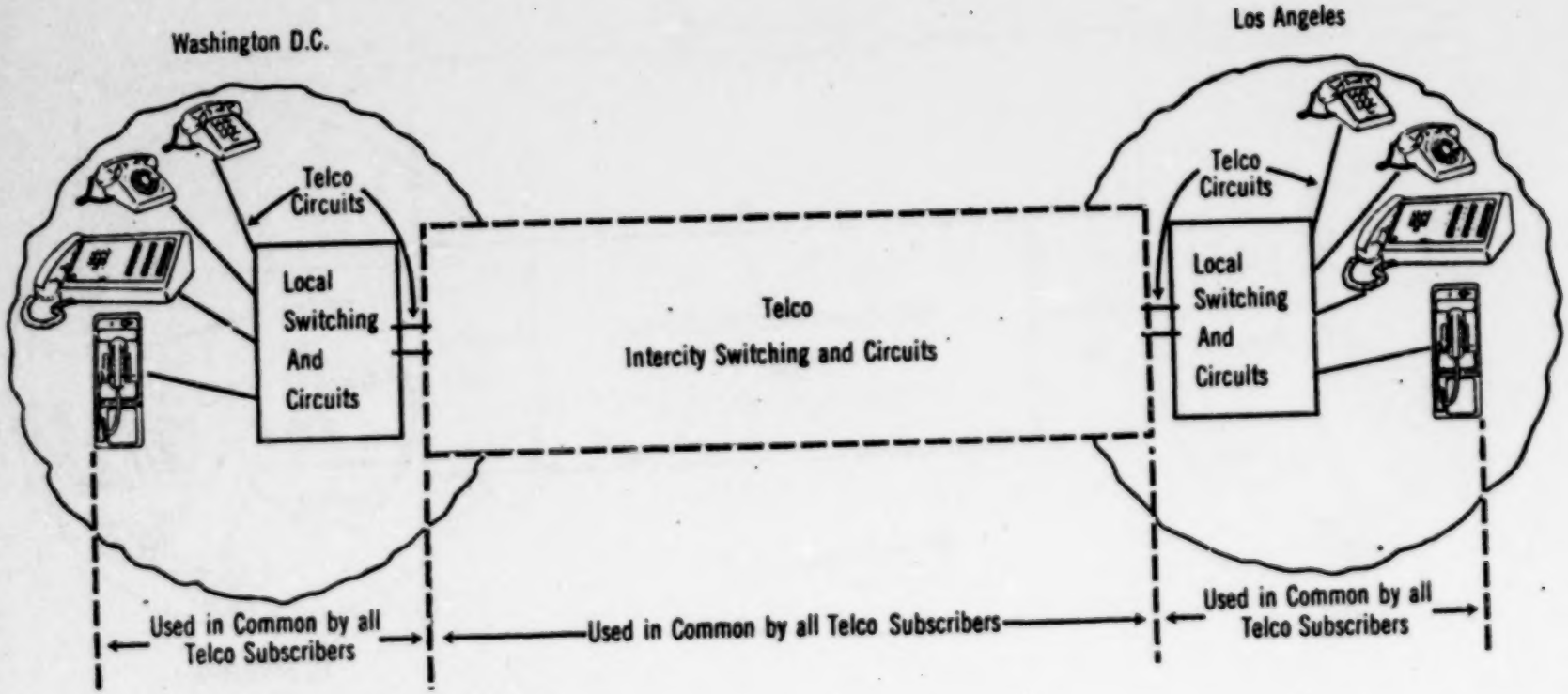
Ninth Circuit Quotations Establishing That MCI Was Granted Authority To Only Provide Private Line Service

". . . The business involved is that of *providing specialized private or leased line communication services* through microwave transmission facilities, *as distinguished from public exchange and long distance toll telephone service.* The latter consists primarily of voice communication service from and to all points on an integrated national and international telephone network, available to the public generally. The proposed service consists of communication of all types of signals, including data and other non-voice traffic, *but only to or from limited points, and only pursuant to private contract.*" *Washington Utilities and Transportation Commission* v. *F.C.C.*, 513 F.2d 1142, 1155 (1975), *cert. denied* 44 U.S.L.W. 3205 (Oct. 1975).

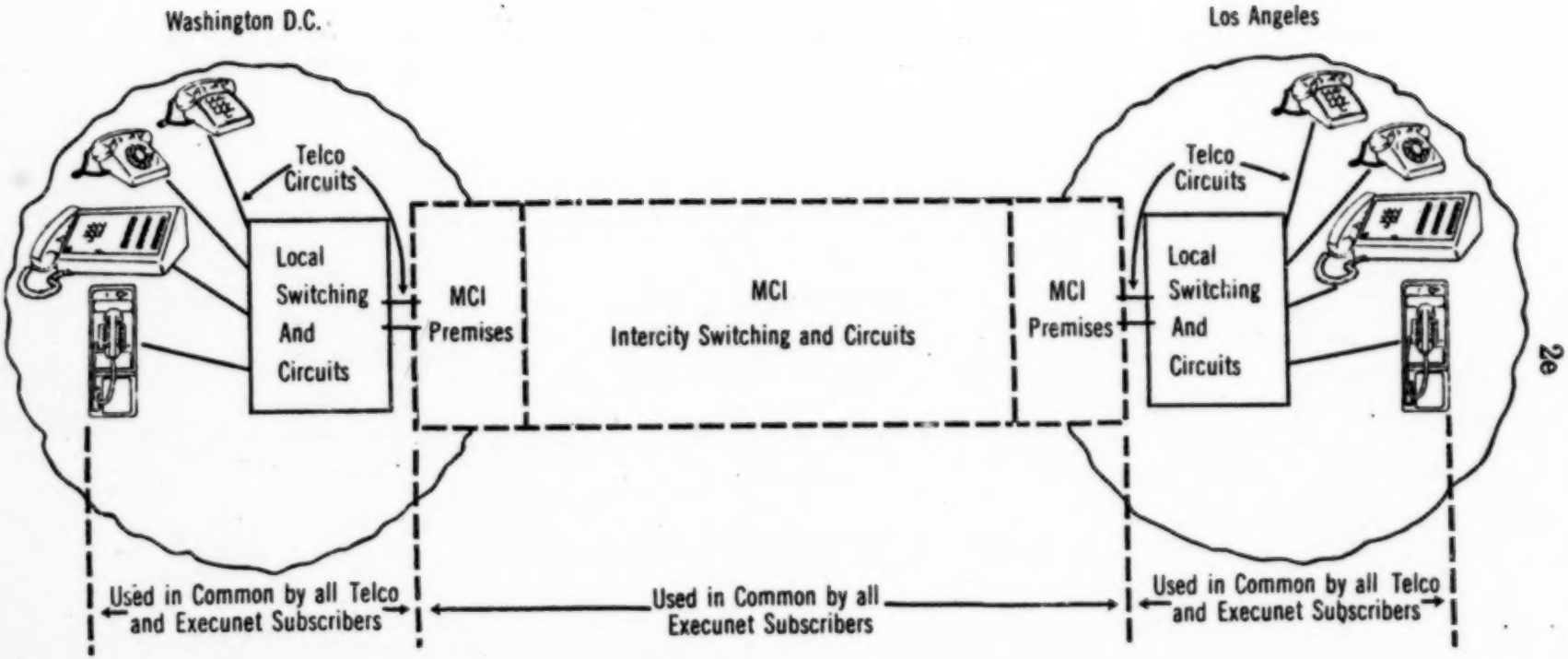
". . . New entry in the specialized field would not adversely affect the furnishing of services to the public by existing carriers. The specialized communications services involved constitute only a small percentage of A.T.&T.'s total market. *The service for standard voice communications services is not affected;* it accounts for the bulk of A.T.&T.'s revenue." *Id.* at 1156 n. 21 (characterizing the views of the Commission, as detailed in its report under review). (Emphasis added.)

". . . The record as a whole indicates that entry by more than one "*private line carrier*" should generally be reasonably feasible, in view of the large and heterogeneous potential market." *Id.* at 1167 n. 33. (Emphasis added.)

AT&T'S LONG DISTANCE MESSAGE TELECOMMUNICATIONS SERVICE



MCI's EXECUNET



2e

—— = Telephone Company (Telco) Local and Intercity Facilities

- - - = MCI Intercity Facilities

MCI 214 Applications and Associated Commission Orders Issued Subsequent to the Specialized Common Carrier Decision. Adopted May 25, 1971

MCI Application		FCC Orders	
Date	Request	Date	Order
5/26/72		5/26/72 (FCC 72-456)	"(2) MCI proposes the construction of a microwave system between New York and Chicago and various intermediate cities for the provision of what is essentially a *private line service* for the transmission of data, facsimile, control, remote metering, voice and other forms of communications." (Emphasis added.) "(3) . . . Commission policy with regard to specialized common carrier facilities such as proposed in these applications was determined in our *First Report and Order* in Docket 18920 released June 3, 1971 (29 F.C.C. 2d 870)."

MCI Application		FCC Orders	
Date	Request	Date	Order
			"(5) Accordingly . . . MCI Is Authorized to install and operate the various channel quantities as specified in paragraph 2 above." (File Nos. 1366/1368-C1-P-70; 1372/1374-C1-P-70; 1377/1381-C1-P-70; 1405/1406-C1-P-70; 1408-C1-P-70; 1411/1412-C1-P-70; 1416/1418-C1-P-70; 1421-C1-P-70; 1423/1426-C1-P-70; 1428-C1-P-70; 1430-C1-P-70; 1910/1911-C1-P-71; 1913/1915-C1-P-71; 1913/1915-C1-P-71; 3249/3270-C1-P-72.)
		8/17/72	"(2) MCI proposed the construction of a microwave system between Detroit, Flint, Jackson, Lansing and Toledo and various intermediate cities for the provision of what is essentially a *private line service* for the trans-

mission of data, facsimile, control, remote metering, voice and other forms of communications." (Emphasis added.)

"(3) . . . Commission policy with regard to specialized common carrier facilities such as proposed in these applications was determined in our *First Report and Order* in Docket 18920 released June 3, 1971 (29 F.C.C. 2d 870)."

"(5) Accordingly . . . MCI Is AUTHORIZED to install and operate the various channel quantities as specified in paragraph 2 above."

(File Nos. 4331/4334-C1-P-70; 4336-C1-P-70; 4338/4345-C1-P-70; 4073 and 4074-C1-P-72.)

9/27/72 (FCC 72-852)

"(2) . . . The service proposed is essentially *private line* for the transmission of data, facsimile, telecom-

MCI Application		FCC Orders	
Date	Request	Date	Order
			munications metering, control, voice and other forms of communications." (Emphasis added)
			"(5) Accordingly . . . MCI St. Louis-Texas, Inc. Is Authorized to install and operate the various channel quantities as specified in paragraph 2 above."
			(File Nos. 5922/5936-C1-P-70; 5950/5951-C1-P-70; 5953/5955-C1-P-70; 2598/2599-C1-P-72; 4107/4123-C1-P-72.)
		10/27/72 (FCC 72-948)	"(2) . . . The service proposed is essentially *private line* for the transmission of data, voice, and other communications." (Emphasis added)
			"(3) . . . Commission policy with regard to specialized services such as

posed in these applications was determined in our *First Report and Order* in Docket No. 18920, 29 F.C.C. 2d 870 (1971). Accordingly, the questions concerning the competitive impact between specialized carriers and existing telephone/telegraph carriers are now considered moot."

(File Nos. 2868/2883-C1-P-70; 2048-C1-P-71; 3552/3558-C1-P-72; 3560/3564-C1-P-72.)

5f

11/5/72 (FCC-1014)

"(2) The proposal contemplates *private line service* for the transmission of data, telecommunications printers, facsimile, control, voice remote metering, and other forms of communications." (Emphasis added.)

"(5) Accordingly . . . MCI Is Authorized to install and operate the various channel quantities as specified in paragraph 2 above."

MCI Application		FCC Orders	
Date	Request	Date	Order
			(File Nos. 8253/8256-C1-P-70; 8258/8266-C1-P-70; 8268, 8270, 8272, 8276, 8278, 8279-C1-P-70; 4237/4250-C1-P-72.)
		11/17/72 (FCC 72-1014)	"(2) . . . the proposal contemplates *private line service* for the transmission of data, telecommunications printers, facsimile, control, voice, remote metering, and other forms of communications." (Emphasis added.)
			"(5) Accordingly, It Is Hereby Ordered that the captioned applications Are Granted and MCI Is Authorized to install and operate the various channel quantities as specified in paragraph 2 above."
			(File Nos. 8253/8256-C1-P-70; 8258/8266-C1-P-70; 8268, 8270, 8272, 8276, 8278, 8279-C1-P-70; 4237/4250-C1-P-72.)

12/5/72	"(2) . . . the proposal contemplates *private line service* for the transmission of voice, data and other forms of communications." (Emphasis added.) "(5) Accordingly, MCI Is AUTHORIZED to install and operate the various channel quantities as specified in paragraph 2 above." (File Nos. 6066/6070-C1-P-70; 6080/6085-C1-P-70; 6087-C1-P-70; 6520/6525-C1-P-72.)
1/7/73 (FCC 73-48)	"(2) The proposal contemplates a *private line service* for the transmission of data, facsimile, control, remote metering and other communications." (Emphasis added.) "(5) Accordingly, MCI Is AUTHORIZED to install and operate the channel quantities as specified in paragraph 2 above."

MCI Application		FCC Orders	
Date	Request	Date	Order
			(File Nos. 6339/6341-C1-P-70; 6344/6352-C1-P-70; 6367/6374-C1-P-70; 6381/6386-C1-P-70; 6397-C1-P-70; 6399-C1-P-70; 6346/6354-C1-P-72; 6357/6372-C1-P-72.
		1/19/73 (FCC 73-48)	"(2) . . . the proposal contemplates *private line service* for the transmission of data, facsimile, control, remote metering, and other communications." (Emphasis added.)
			"(5) Accordingly, IT IS HEREBY ORDERED . . . that MCI Is AUTHORIZED to install and operate the channel quantities as specified in 2 above.
			(File Nos. 6339/6341-C1-P-70; 6344/6352-C1-P-70; 6367/6374-C1-P-70; 6381/6386-C1-P-70; 6397-C1-P-70; 6399-C1-P-70; 6346/6354-C1-P-72; 6357/6372-C1-P-72.)

3/19/74 "(4) . . . the facilities to be leased . . . will be used to provide data, voice, and other specified communications services."

"(13) The extension of the service area of MCI will thus fulfill the public need *consistent with the policy determinations reached by the Commission in Docket 18920.* (Emphasis added.)

"(15) *Consistent with the Commission's policy* of fostering competition in the market for specialized communications, *adopted in Docket 18920,* MCI is permitted to serve the cities . . . ." (Emphasis added.)

(File No. W-P-C-56.)

3/19/74 "(12) . . . a grant of the authority requested herein will further the stated goals of MCI and of the Commission in Docket 18920 to provide a

MCI Application		FCC Orders	
Date	Request	Date	Order
	competitive service between Houston and the other points in the MCI network." "(14) . . . *consistent with the Commission's policy* of fostering competition in the market for specialized communications, adopted in Docket 18920, MCI is permitted to serve the city of Houston." (Emphasis added.) (File No. W-P-C-52.)		
6/10/74	"(6) The applicants are specialized common carriers which offer communications services to the public *as a direct result of the policy adopted by the Commission in Docket 18920.*" (Emphasis added.) "(7) *Consistent with the Commission's policy as adopted in Docket 18920* the applicants, in the provision	10/1/74 (FCC-74M-1255)	"(6) Accordingly . . . MCI Telecommunications Corporation . . . ARE HEREBY AUTHORIZED to construct the facilities as proposed in the above-captioned application; . . ." (File No. W-P-C-113)

of specialized communications services . . . ." (Emphasis added.)

(File No. W-P-C-113.)

11/6/74 "(1) . . . the applicant is a specialized common carrier which offers communications services to the public *as a direct result of the policy adopted by the Commission in Docket 18920.*" (Emphasis added.)

"(n) *Consistent with the Commission's policy as adopted in Docket 18920,* the applicant in its provision of specialized communication services . . . ." (Emphasis added.)

11/13/74 "(2) . . . the proposed facilities would be used to provide interstate *private line service.*" (Emphasis added.)

"(4) Accordingly . . . N-Triple-C and MCI ARE AUTHORIZED the various channel quantities as specified in paragraph 2 above.

MCI Application		FCC Orders	
Date	Request	Date	Order
			(File Nos. 375 and 376-CF-P-25; 377 and 378-CP-P-75.
11/15/74	"(1) . . . the applicant is a specialized common carrier which offers communications services to the public *as a direct result of the policy adopted by the Commission in Docket 18920.*" (Emphasis added.) "(n)*Consistent with the Commission's policy as adopted in Docket 18920,* the applicant in its provision of specialized communications services . . . ." (Emphasis added.) (File No. W-P-C-233.)	1/2/75	"It Is Certified, That the public interest and necessity would be served by the construction and operation of the facilities as proposed in the applications." (File No. W-P-C-233 and W-P-C-234.)
		2/26/75	"(2) . . . through interconnection with existing facilities, the proposed facilities *would be used to provide interstate private line services.*" (Emphasis added.)

(File No. 2029-CF-P-75; 2030-CF-P-75.

3/21/75 "(2) The proposed facilities will be used to provide customized business communications, voice and/or data services."

(File No. W-P-C-352.)

7/16/75 "(5) . . . accordingly, IT IS ORDERED, that . . . MCI Telecommunications Corporation Is HEREBY AUTHORIZED to install and operate the additional channels quantities, or the equivalent thereof, as specified in paragraph 2, *for the purpose of rendering specialized communications services consistent with the Commission's decision in the First Report and Order in Docket No. 18920, 29 F.C.C.2d 870.*" (Emphasis added.)

(File No. W-P-C-352.)

4/21/75 "(2) The proposed facilities will be used to provide customized business communications voice and/or data services."

(File No. W-P-C-387.)

7/24/75 "(2) In the application, MCI proposes . . . providing customized business communications, voice and/or data services. . . ."

"(5) Accordingly . . . MCI Telecommunications Corporation Is HEREBY

MCI Application		FCC Orders	
Date	Request	Date	Order
			AUTHORIZED to install and operate the additional channels quantities, or the equivalent thereof, as specified in paragraph 2, *for the purpose of rendering specialized communications services consistent with the Commission's decision in the First Report and Order in Docket No. 18920, 29 F.C.C.2d 870.''* (Emphasis added.) (File No. W-P-C-387.)
5/16/75	"(2) The proposed facilities will be used to provide customized business communications, voice and/or data services." (File No. W-P-C 422.)	7/24/75	"(2) In this application, MCI Telecommunications Corporation proposes . . . providing 'customized business communications, voice and/or data services'. . . ." "(5) Accordingly, IT IS ORDERED that . . . MCI Telecommunications Corporation IS HEREBY AUTHORIZED to install and operate the additional chan-

nels quantities, or the equivalent thereof, as specified in paragraph 2, *for the purpose of rendering specialized communications services consistent with the Commissions decision in the First Report and Order in Docket No. 18920, 29 F.C.C.2d 870.*" (Emphasis added.)

(File No. W-P-C 422.)

5/20/75 "(2) The proposed facilities will be used to provide customized business communications, voice and/or data services."

(File No. W-P-C-427.)

7/24/75 "(2) In the application, MCI Telecommunications Corporation proposes . . . providing 'customized business communications, voice and/or data services' . . . ."

"(5) Accordingly, IT IS ORDERED, that . . . MCI Telecommunications Corporation Is HEREBY AUTHORIZED to install and operate the additional channels quantities, or the equivalent thereof, as specified in paragraph 2, *for the purpose of rendering specialized communications services consist-*

MCI Application		FCC Orders	
Date	Request	Date	Order
			ent with the Commission's decision in the First Report and Order in Docket No. 18920, 29 F.C.C.2d 870." (Emphasis added.) (File No. W-P-C-427.)
5/19/75	"(2) The proposed facilities will be used to provide customized business communications, voice and/or data services." (File No. W-P-C-420.)	7/31/75	"(2) In the application Microwave Communications, Inc. proposes . . . 'customized business communications, voice and/or data services' . . . ." "(5) Accordingly, It Is Ordered, that . . . Microwave Communications, Inc. Is Hereby Authorized to install and operate the additional channels quantities, or the equivalent thereof, specified in paragraph 2, *for the purpose of rendering specialized communications services consistent with the Commissions decision in the First Re-*

port and Order in Docket No. 18920, 29 F.C.C.2d 870." (Emphasis added.)

(File No. W-P-C-420.)

9/22/75 "(2) . . . the provision proposed is essentially *private line* for the transmission of data, facsimile, control, remote metering, voice and other communications." (Emphasis added.)

"(3) . . . *Commission policy with regard to specialized common carrier facilities* such as proposed in these applications *was determined by our First Report and Order in Docket 18920, released June 3, 1971 (29 F.C.C. 2d 870).* Accordingly, the question concerning the competitive impact between specialized carriers and existing telephone/telegraph carriers and with regard to possible mutually exclusive status are now considered moot." (Emphasis added.)

MCI Application		FCC Orders	
Date	Request	Date	Order
		10/22/75 (FCC 75T-20)	"(2) . . . MCI . . . proposes to establish channels of communications between Los Angeles, California and terminals located in San Francisco and Oakland for the purpose of extending MCI's 'specialized voice and/or data carrier communications services'. . . ." "(5) Accordingly . . . MCI Telecommunications Corporation Is Hereby Authorized to install and operate the channel quantities, or the equivalent thereof, as specified in paragraph 2, for the purpose of rendering specialized communications services *consistent with the Commissions decision in the First Report and Order in Docket No. 18920, 29 F.C.C.2d 870.*" (Emphasis added.) (File No. W-P-C 439.)

Supreme Court, U. S.
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No. 77-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

REPLY OF PETITIONER

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TABLE OF CONTENTS

Page

I. Respondents Have Failed To Answer The Compelling Reasons For Granting Certiorari 2

II. The Other Arguments Advanced By Respondents Neither Support The Decision Below Nor Justify Denial Of Certiorari 9

CONCLUSION 16

TABLE OF AUTHORITIES

CASES AND ADMINISTRATIVE PROCEEDINGS:

Aberdeen & Rockfish R.R. v. *SCRAP*, 442 U.S. 289 (1975) 15

Bell Telephone Company of Pennsylvania v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) 2, 8

Business Executives' Move for Vietnam Peace v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom. CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973) 15

CBS v. *Democratic National Committee*, 412 U.S. 94 (1973) 15

Domestic Public Radio Services, 21 Fed. Reg. 4724 (Sept. 4, 1956) 12

FCC Docket No. 19117, 39 F.C.C.2d 131 (1973) 10, 11

Home Box Office, Inc. v. *FCC*, D.C. Cir. No. 75-1280 *et al.* (March 25, 1977), *cert. denied*, 46 U.S.L.W. 3216 (October 4, 1977) 13

Interstate Broadcasting Co. v. *FCC*, 265 F.2d 598 (D.C. Cir. 1959) 12

National Broadcasting Co. v. *FCC*, 362 F.2d 946 (D.C. Cir. 1966) 12

Press Wireless, Inc. v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) 6

Press Wireless, Inc., 25 F.C.C. 1466 (1958), *aff'd per curiam sub nom. Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) 6

Page

SCRAP v. *United States*, 371 F. Supp. 1291 (D.D.C. 1974), *rev'd sub nom. Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289 (1975) 15

Specialized Common Carrier Services, 29 F.C.C.2d 870, *recon. denied*, 31 F.C.C.2d 1106 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) ..... passim

Udall v. *Tallman*, 380 U.S. 1 (1965) 10

United Telegraph Workers v. *FCC*, 436 F.2d 920 (D.C. Cir. 1970) 6

Washington Utils. & Transp. Comm'n v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) .. 2

CONSTITUTION AND STATUTES:

Communications Act of 1934:

Section 214, 47 U.S.C. § 214 ..... passim

Section 409, 47 U.S.C. § 409 13

Federal Aviation Act, Section 401, 49 U.S.C. § 1371 ... 5

Interstate Commerce Act, Section 1(18), 49 U.S.C. § 1(18) 5

FCC RULES:

Section 21.2, 47 C.F.R. § 21.2 (1976), *adopted* 21 Fed. Reg. 4724 (September 4, 1956) 12

Sections 1.203(a), 1.207(a), 47 C.F.R. §§ 1.203(a), 1.207(a) (1976) 13

MISCELLANEOUS:

MCI Motion to Strike Consolidated Answer to Motion and Cross-Motion For Leave to File Copies of Commission Decision, May 15, 1974, filed in *Washington Utils. & Transp.* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975)- 4

MCI Brief, FCC Docket No. 19896, January 21, 1974 .. 10

MCI Comments, FCC Docket No. 18920, October 1, 1970 10

IN THE

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OCTOBER TERM, 1977

No. 77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
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v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF PETITIONER

Certiorari has been sought to review the judgment below by AT&T in this case and by the FCC and United States Independent Telephone Association in Nos. 77-420 and 77-436.[1] This reply is filed by AT&T in response to oppositions to certiorari filed by MCI and by Southern Pacific Communications Company.

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[1] Amici briefs in support of certiorari have been filed by the National Association of Regulatory Utility Commissioners and by the state authorities or utility commissions in the District of Columbia, Michigan, New Jersey, Ohio, Tennessee, Virginia and West Virginia.

I. Respondents Have Failed To Answer The Compelling Reasons For Granting Certiorari.

1. AT&T's petition demonstrated that there is a direct conflict on the scope of specialized carrier authority between the District of Columbia Circuit in this case and decisions of the Ninth and Third Circuits.[2] The District of Columbia Circuit held that MCI is free to provide any service it chooses including ordinary long-distance telephone service. Pet. App. 1a. The clear language of the Ninth Circuit[3] and the Third Circuit[4] reflects their contrary conclusion that specialized carriers are limited to providing private line service.

MCI seeks to brush aside the pertinent language of the conflicting decisions as "merely prefatory" (MCI Br. 15) and—in the case of the Ninth Circuit—as "a simple general description of the services proposed in the specific applications then before the Commission."

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[2] *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[3] *E.g.*, "The [specialized carrier] business involved is that of providing specialized private or leased line communications services . . . as distinguished from . . . long-distance toll telephone service." 513 F.2d at 1155. "'[E]ntry by more than one private line carrier should generally be feasible . . . .'" *Id.* at 1167, n. 33. "The market for standard voice communications service is not affected . . . ." *Id.* at 1156, n. 21.

[4] Specialized carriers are permitted to provide services "within the rubric of 'private line services'." 503 F.2d at 1260-61. "[T]he public interest favored the entry of specialized carriers into the full field of private line services." *Id.* at 1270. The FCC determined to permit "competition in the provision of interstate private line communications . . . ." *Id.* at 1273 (quoting *Specialized Carrier* decision).

MCI Br. 32-33.[5] The language was clearly not merely "prefatory" or "descriptive" because, in both cases, the governing legal rules compelled the courts to determine what services were being authorized or affected by the orders involved. AT&T's petition demonstrated this by describing the applicable rules and quoting from the courts' own reasoning (AT&T Pet. 13-16) and MCI does not even attempt to answer this showing.

MCI (MCI Br. 32-35) then attempts to distinguish the Ninth and Third Circuit decisions on the ground that the ultimate issues in those cases differed from the ultimate issue presented below. See also SPCC Br. 8-9. However, in order to decide the ultimate issues in each of the three cases, it was necessary for each of the courts to determine what class of service the specialized carriers were entitled to provide; and, on this central issue, the District of Columbia Circuit clearly did disagree with the Ninth and Third Circuits. The resulting disagreement is as much a conflict as to holdings—legal determinations which are necessary to the resolution of a case—as any conflict imaginable.[6]

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[5] This is itself a damning admission by MCI. The class of "services proposed in the specific applications" were precisely what the FCC considered in its specialized carrier proceedings; Section 214 (c) provides that the Commission may issue such certificates "as applied for"; and MCI's authority is therefore clearly confined to the class of services described in the applications "then before the Commission." MCI Br. 32-33.

[6] For example, MCI asserts that the issues in the Ninth Circuit were, *inter alia*, "whether the FCC could authorize competition at all." MCI Br. 32. Similarly, in the decision below, the ultimate issue could be described as whether the FCC properly rejected MCI's Execunet tariff. However, in order to decide "whether the FCC could authorize competition at all" on the basis of the record before it and whether the FCC had validly rejected Execunet's tariff, the court in each case was required to determine what competition the FCC had authorized.

MCI's attempt to deny that the Ninth Circuit and Third Circuit considered and reached conclusions on the scope of competition issue is especially startling in light of the representations made in MCI's own briefs and oppositions to certiorari in those cases. See AT&T Pet. 8 and Pet. App. 4d, 6d. In addition, prior to the Ninth Circuit decision, MCI filed a pleading in that court stating: "Specialized carriers are *not* authorized to furnish the equivalent or [sic] ordinary long distance telephone service . . . ."[7] MCI's document continued:

> "They [the specialized carriers] proposed, and have been authorized, to provide the full range of *private line* services. They have never proposed—and have not applied for the facilities required for—the provision of long distance service, which involves the ability to reach every other telephone in the system." *Id.* at 10 (emphasis in original).

2. The lower court held that the FCC could not grant a certificate of public convenience and necessity for facilities to provide only a limited class of service—even though only such a limited grant had been sought—without making an affirmative determination that it would be contrary to the public interest for the applicant to provide other services which the applicant had never proposed. See Pet. App. 29a-30a. AT&T's petition for certiorari showed that this extraordinary requirement was contrary to the plain language of Section 214, to the statute's rationale, to its consistent administrative construction and to common sense. AT&T Pet. 18-25.

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[7] MCI motion to strike consolidated answer to motion and cross-motion for leave to file copies of commission decision, p. 9, May 15, 1974, filed in *Washington Utils. & Transp. Comm'n* v. *FCC*, *supra* (emphasis in original).

Even if the lower court's decision were only arguably wrong, the importance of the issue would warrant certiorari. Section 214 is a keystone provision in the FCC's regulatory plan; and parallel statutory provisions are of similar importance to other regulatory agencies.[8] In all events, the arguments of MCI and Southern Pacific do not even begin to shore up the lower court's construction of the statute, which is unsupported by its language and contrary to its purpose and history, and which would impose enormous burdens on administrative agencies called upon to make public interest determinations with respect to services not even proposed by applicants for specific service authorizations.

MCI first attempts to suggest (MCI Br. 16) that there is a pure dichotomy between facilities authorizations and the services to be provided over the facilities, that Section 214 is only concerned with the former question, and that the latter is controlled wholly by tariff filing provisions. Whether a new facility is in the public interest or harmfully duplicative may depend on what services it will be used for; and even the lower court rejected the dichotomy suggested by MCI, agreeing that "Section 214(c) does . . . authorize the Commission to restrict the services that may be offered . . . ." Pet. App. 24a. Nor is it true (MCI Br. 16) that a new service may invariably be provided over existing facilities merely by filing a tariff,[9] since it is well established

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[8] *E.g.*, Interstate Commerce Act, Section 1(18), 49 U.S.C. § 1(18); Federal Aviation Act, Section 401, 49 U.S.C. § 1371.

[9] MCI's citation of two railroad cases (MCI Br. 16) does not support its position. In each case, it was found that the ancillary use of trucks by the rail carriers was not subject to the ICC's authority to certify railroad tracks, terminals and similar rail facilities. Here, however, MCI's Execunet service involves the use of communication facilities admittedly subject to the FCC's certification authority.

that a carrier may not lawfully file tariffs to provide a service beyond its basic certificate or grant of authority.[10]

Contrary to MCI's assertion (MCI Br. 17-18), this reading of the Act is wholly consistent with past practice. Where a railroad or telephone company or Western Union proposes to offer a service or engage in any other activity contrary to its certificated authority, it, too, must seek an expansion or change in authority from the Commission.[11] Moreover, MCI's argument has nothing to do with the lower court's "affirmative determination" requirement for which neither MCI nor the lower court provided any precedent whatever.

So far as MCI seeks to support the lower court's actual holding, it relies primarily on the language in Section 214(c) that the Commission may attach "conditions" to a certificate and then argues that the lower court was "merely restating" this express command when it called for affirmative determinations to prevent a carrier from providing service it had never proposed

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[10] *Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) *aff'g per curiam Press Wireless, Inc.*, 25 F.C.C. 1466 (1953). See other cases involving the CAB and ICC cited at AT&T Pet. 24 n. 42.

[11] *United Telegraph Workers* v. *FCC*, 436 F.2d 920 (D.C. Cir. 1970), cited by MCI actually contradicts its position. That case upheld Western Union's right to offer its new "Mailgram" service on an experimental basis without obtaining an expansion of its Section 214 authorization only after first finding that the service, so far as Western Union's involvement was concerned, did not involve a substantial change in existing services. 436 F.2d at 924-25. Execunet, which the FCC has found to be different in all material respects from private line service, does involve a substantial change in service departing from the terms of MCI's existing authority and it therefore does require a new Section 214 authorization.

to provide. MCI Br. 18. MCI simply ignores the preceding language in Section 214(c)—providing that the Commission can issue a certificate "as applied for"—which is controlling in this case. MCI never proposed in the *Specialized Carrier* proceeding or elsewhere to provide any service other than private line service, so no further "affirmative" restrictions were necessary to limit MCI's grant to what it had sought.[12]

3. AT&T's petition showed that the lower court's decision would have serious adverse consequences for common carrier regulation going far beyond the immediate controversy over long distance telephone service. Respondents have not in any way dispelled these concerns.

First, the FCC has authorized numerous classes of limited service carriers, by codified rule, general rulemaking proceedings and individual grants, without ever making the type of affirmative determination called for by the lower court. AT&T Pet. 23, 26-27. Under the lower court's decision, havoc will be caused in this careful allocation of authorizations designed to implement national communications policy. Any limited service grant, even if based on a limited service application, may now be attacked as inconsistent with the lower court's decision even though such categories have existed since the establishment of the Communica-

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[12] MCI also argues (MCI Br. 18) that its construction is made "doubly obvious" by the final proviso to Section 214(a). That proviso, which permits minor changes in facilities and operations that do not affect the adequacy or quality of service was merely designed to avoid trivial and repetitive filings every time a piece of equipment wore out or other such minor change had to be made. It does not purport to authorize the provision of a new service by a carrier beyond the scope of its basic operating authority.

tions Act. MCI and Southern Pacific do not even advert to this consequence of the decision.

Second, AT&T's petition showed that numerous grants, major FCC policy pronouncements and even court decisions now rest on the premise that specialized carriers are limited to providing private line service; and many of them may be re-opened and invalidated if that basic assumption is overturned by the lower court's decision. AT&T Pet. 27-28.[13] MCI blandly responds (MCI Br. 38) that the prior grants have become "final and not subject to further review." The lower court's decision is no less an alteration of a previously final decision, because it removes limitations—for lack of the supposedly required "affirmative determination"—adopted in the *Specialized Carrier* case in 1970 and affirmed by the Ninth Circuit in 1975. If such a "final" limitation on specialized carrier authority can be removed retroactively, then "final" grants stemming from the same decision are no less liable to subsequent attack.[14]

Third, even if the FCC holds further proceedings to impose on the specialized carriers the restrictions everyone has long believed to be applicable, the eco-

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[13] Indeed, the Third Circuit's decision has already recognized that the interconnection orders before it would be invalid if specialized carrier authority were unlimited. See 503 F.2d at 1273.

[14] In any event, the specialized carrier grants and interconnection orders are still open to direct attack in the very courts that considered or affirmed them. AT&T cited ample authority in its certiorari petition (AT&T Pet. 28, n. 47) affirming the right of appellate courts to recall their mandates and reopen previously "final" orders to prevent fraud, serious mistake, or injustice. In light of MCI's representations that it was only authorized to provide private line service, this is clearly such a case.

nomic impact in the meantime would be severe. AT&T Pet. 29-30. MCI belittles this concern by asserting that only a limited number of transmission facilities have been utilized for the specialized and satellite carriers. MCI Br. 37-38. It is sufficient to note that MCI, SPCC and other specialized and satellite carriers already serve 150 cities with a total population of 43 million people. Moreover, even if the number of cities were far more limited, the provision of Execunet-type services threatens the destruction of a nationwide rate averaging that has long assisted in providing affordable long distance telephone rates to all people in the United States. AT&T Pet. 4.

II. The Other Arguments Advanced By Respondents Neither Support The Decision Below Nor Justify Denial Of Certiorari.

In attempting to defeat certiorari, MCI offers several different arguments—not adopted by the lower court—to support its Execunet offering and repeats its usual *ad hominum* attacks on its opponents. MCI and Southern Pacific also suggest, quite wrongly, that the need for judicial review is lessened by the lower court's remand of the case to the Commission.

1. Seeking to defend the lower court's result on grounds not adopted by the lower court, MCI first argues that the Commission's *Specialized Carrier* decision never intended to preclude specialized carriers from providing ordinary long distance service. MCI Br. 24-27. This is a plainly inaccurate contention since MCI specifically described its proposed services in the *Specialized Carrier* case as excluding ordinary long distance service,[15] since the FCC in the *Specialized*

[15] MCI stated that "MCI-type applicants propose to offer only

Carrier case repeatedly confined itself to authorizing private line competition and reasoned that ordinary long distance service would be unaffected (see, *e.g.*, 29 F.C.C.2d 870, 911, 915), and since both the FCC and MCI have repeatedly represented following the *Specialized Carrier* decision that it covered private line service but did not extend to ordinary long distance service.[16] In any event, MCI's argument represents a direct attack on the FCC's unanimous interpretation of its *own* prior decision and grants and is contrary to uniform authority affording great weight to the agency's reasonable interpretation of what the agency itself meant in a prior rule or decision. *E.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965).

MCI next asserts that even if it were limited to private line service by the *Specialized Carrier* decision, this limitation was removed by the FCC's order terminating Docket No. 19117. MCI Br. 19-20. Once again, this is a disagreement with the FCC's reading of its own prior order and lends no support to the statutory ground actually adopted by the lower court. The claim is also without merit since the FCC never

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customized point-to-point services and have no intention of attempting to compete with [AT&T] in providing local exchange or long distance toll telephone service, which account for the bulk of [AT&T] revenues." MCI comments, Oct. 1, 1970, pp. 27-28. See also other quotations at Pet. App. 3d-4d.

[16] MCI's statement to the Ninth Circuit quoted at p. 4, above, is only one of many such statements. As another example, in the FCC proceeding that led to the Third Circuit decision, MCI stated to the Commission: "[The *Specialized Carrier* proceeding] dealt with private line services" and concerned the question whether business and data customers would benefit from competition in "this limited corner of the overall common carrier communications market." MCI brief, Jan. 21, 1974, p. 40. See also Pet. App. 4d-7d.

suggested in its order in Docket No. 19117 that it was altering the *Specialized Carrier* decision,[17] and both MCI and the FCC continued to construe the *Specialized Carrier* decision to exclude ordinary long distance service well after the February 1973 order terminating Docket No. 19117.[18]

Finally, MCI suggests that Execunet is in fact a private line service rather than a form of ordinary long distance telephone service. MCI Br. 7-9, 29-31. The FCC, however, found that Execunet had "all" the essential characteristics of switched public message service and none of the characteristics of private line service (Pet. App. 35b) and its determination was supported by copious findings and reasoning. Pet. App. 29b-36b, 64b-70b. MCI's own statements and literature confirm that Execunet provides a basic capability of using any (push-button) telephone in one city to reach any telephone in a distant city,[19] the facilities are used in turn by all customers and are not dedicated to any

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[17] Docket No. 19117 was initiated prior to the *Specialized Carrier* decision proposing new rules primarily in order to maintain the *status quo* in certain respects pending that decision. 39 F.C.C.2d at 133. When the *Specialized Carrier* decision was adopted, the FCC terminated Docket No. 19117 without adopting the originally proposed rules on the ground that the *Specialized Carrier* decision had made them unnecessary. *Id.*

[18] In addition, after February 1973, FCC grants of individual MCI applications continued, just as they had done before, to refer specifically to use of the facilities for "interstate private line service" or specialized service "consistent with the Commission's decision" in the *Specialized Carrier* case. Excerpts appear at Pet. App. 9f-13f.

[19] Execunet can also be used to originate calls from dial telephones by using a small tone generator to duplicate push button signals. See Pet. App. 3a, n.3.

individual customer, and calls are paid for essentially on a call-by-call basis subject to a monthly minimum.[20] Even in a disputable case, the agency's expert judgment in classifying a particular type of service would be compelling,[21] and the lower court did not purport to rest its decision on any disagreement with the Commission's categorization of Execunet.

2. MCI spices its brief with its now-familiar litany of *ad hominum* attacks on the Commission and AT&T. Those directed at the Commission complain essentially of the "celerity" of the Commission's action (MCI Br. 10) and imply that the Commission has never given the matter adequate attention. MCI Br. 11. The record of Commission proceedings in this case, stretching over an entire year, amply refutes this claim. For almost a decade, the Commission has sedulously fostered the specialized carriers and resolved countless disputed cases and issues in their favor. So far as it acted with "celerity" in this case, this reflects noth-

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[20] These characteristics clearly demonstrate that Execunet is in no sense a private line service. Although MCI also claims that the definitions of private line service and public switched message service are *ad hoc* creations (MCI Br. 29-30), in fact the definitions have been contained in the Commission's rules for more than twenty years (*see* Domestic Public Radio Services, 21 Fed. Reg. 4724 (Sept. 4, 1956), *codified at* 47 C.F.R. § 21.2 (1976)). The application of these long-standing definitions was singularly easy in this case because MCI clearly offers service on a "non-exclusive message-by-message basis" with a "separate connection for each occasion of use" rather than provision of facilities between "two or more designated points" which are "set aside for the exclusive use or availability for use" of a particular customer and authorized users. 47 C.F.R. § 21.2 (1976).

[21] *Interstate Broadcasting Co.* v. *FCC*, 265 F.2d 598, 605 (D.C. Cir. 1959); *National Broadcasting Co.* v. *FCC*, 362 F.2d 946, 958 (D.C. Cir. 1966).

ing other than the blatant character of MCI's violation in offering service so clearly outside the scope of its authority. The Commission's ultimate determination is supported by a lengthy and scrupulously detailed opinion by a unanimous Commission.[22]

MCI also alleges, as it did in the court below, that AT&T engaged in impermissible *ex parte* contacts which may have influenced the Commission. MCI Br. 10-11. AT&T advised the Commission, prior to the initiation of *any* proceedings involving Execunet, that the FCC ought to examine the matter. This was entirely permissible under the applicable statutes (Communications Act, Section 409(c), 47 U.S.C. § 409(c)), under the Commission's *ex parte* rules (47 C.F.R. §§ 1.1203(a), 1.1207(a) (1976)), and under even the most far-reaching of the applicable precedents. *Home Box Office, Inc.* v. *FCC,* D.C. Cir. No. 75-1280 *et al.* (March 25, 1977), *cert. denied,* 46 U.S.L.W. 3216 (October 4, 1977).

Moreover, AT&T's requests that the Commission examine the matter occurred prior to the FCC's original letter order in July 1975. Following that order and MCI's appeal, the lower court permitted an entirely new set of proceedings, because MCI was attempting to make additional arguments and defenses of Execunet service not previously presented to the Commission. Those proceedings involved full briefs and lengthy oral argument before the Commission, affording all

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[22] MCI also complains (MCI Br. 12-13) that the FCC voted on the case immediately after oral argument. This is, of course, common practice in appellate courts. Moreover, the FCC had the briefs available for several months before oral argument and MCI said nothing in its oral argument that it had not said before.

parties opportunity to make a full and fresh presentation on all relevant issues.

3. The oppositions of both MCI (MCI Br. 35-36) and Southern Pacific (SPCC Br. 10-11) suggest that review is unnecessary because of the lower court's remand and the possibility of further agency proceedings. It is unclear whether respondents are arguing that the FCC can cure in further proceedings the difficulties created by the lower court's decision or whether they are suggesting that the legal issues may be more fully developed after remand. On either branch of the argument, respondents are patently wrong.

The lower court's decision has determined, as a matter of statutory construction, that the Commission's establishment of limited-service authority for common carriers is invalid in the absence of a specified "affirmative determination." The decision undermines the entire regime of limited service carriers that the Commission has created during the four decades of regulation; and, for the future, it promises that no proceedings for a limited service grant can be completed without laborious and wholly unnecessary consideration of services which the applicant has never proposed to provide. Nothing the Commission can do in further proceedings to limit the specialized carriers' particular operations can erase the lower court's statutory requirement as it applies to all other classes of carriers and all future proceedings.

Even if all other classes of carriers are ignored and future grant proceedings are put to one side, review by this Court now is essential to avoid extraordinarily protracted and wasteful litigation before the Commission and the lower appellate court respecting the va-

lidity of prior specialized carrier grants and the validity of Commission orders in numerous related matters including interconnection. See AT&T Pet. 27-29. In addition, review now is necessary to prevent a serious adverse effect on rates paid by the public which could result from unlimited expansion of Execunet-type services during the extended period in which further Commission proceedings would be undertaken. See *id.* at 29-31.

This Court has repeatedly granted certiorari where a lower court has ordered further agency proceedings on the basis of an improper legal ruling. *E.g., Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289 (1975), *rev'g SCRAP* v. *United States*, 371 F. Supp. 1291 (D.D.C. 1974); *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973), *rev'g Business Executives' Move For Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971). Review now in the present case is clearly warranted since further agency proceedings cannot affect the statutory issue or assuage the need for its definitive resolution by this Court.

Finally, the case presented is clearly not "premature." The basic statutory issue was decided by the lower court explicitly and without qualification. The further Commission proceedings contemplated by the lower court would have nothing to do with this basic question, as the lower court makes quite clear. Pet. App. 31a. Nothing whatever would be gained by delaying review in this case. Instead, there would be a substantial waste of administrative and judicial resources, as well as prolonged uncertainty and confusion, if certiorari were denied.

CONCLUSION

For the reasons stated above and in AT&T's petition, certiorari should be granted.

Respectfully submitted,

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November 1977

Supreme Court, U. S.
FILED
DEC 1 1977
MICHAEL RODAK, JR., CLERK

No. 77-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL REPLY OF PETITIONER

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December 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
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v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL REPLY OF PETITIONER

The United States has filed a memorandum supporting the grant of certiorari to review the decision below. In seeking certiorari, the Federal Communications Commission, AT&T and USITA represented that the case presents issues of fundamental importance concerning the statutory determinations to be

made under Section 214 of the Communications Act and the scope of existing specialized carrier authority. The Solicitor General's memorandum (p. 6) confirms and underscores that representation.

Nothing said by Southern Pacific, in its supplemental opposition to certiorari, diminishes the import of the Solicitor General's memorandum or the need for certiorari. The reasons for certiorari "at this time" (compare SP supp. opp. 2) are obvious: the lower court has expressly decided significant statutory issues which affect the basic processes of the Commission and it has decided those issues in conflict with the language of the statute, the FCC's construction of it, and over forty years of consistent administrative practice. The further proceedings ordered by the lower court do not involve any further examination of these legal issues.

Similarly, nothing Southern Pacific does or could say about the decisions of Ninth [1] and Third Circuits [2] can alter the basic fact pertinent to certiorari: both decisions directly conflict with the decision below on the scope of specialized carrier authority. The scope of that authority is a matter of continuing and urgent importance, affecting the validity of thousands of outstanding grants and numerous related FCC decisions. See AT&T reply 2-4, 7-9.

The immediate impact and continuing importance of the issues presented is beyond rational dispute.

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[1] *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir), *cert. denied*, 423 U.S. 836 (1975).

[2] *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

Only recently Southern Pacific moved for summary reversal of two more FCC decisions, now awaiting review in the lower court, on the ground that those cases are governed by the decision in this case.[3] The Solicitor General's memorandum amply confirms that the legal questions raised and the conflict in the circuits warrant review in this Court.

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[3] On October 7, 1977, Southern Pacific moved for "summary reversal" in both cases on the ground that "the *ratio decidendi* of the Commission decisions under review has been squarely rejected and repudiated by this Court [the Court of Appeals] in *MCI Telecommunications Corp.* v. *FCC*, decided July 28, 1977 (Court *Execunet* decision)." SP motion, p. 2 (footnote omitted), in *Southern Pacific Communications Co.* v. *FCC*, D.C. Cir., Nos. 77-1195 and 77-1196.

CONCLUSION

For the reasons stated above and in AT&T's petition, certiorari should be granted.

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SUPPLEMENTAL MEMORANDUM OF PETITIONER

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SUPPLEMENTAL MEMORANDUM OF PETITIONER

Pursuant to Supreme Court Rule 24(5), this supplemental memorandum is filed by petitioner AT&T to bring to the Court's attention a pertinent decision just released by the United States Court of Appeals for the Second Circuit. *Western Union Int'l* v. *FCC*, Nos. 77-4183, *et al.*, Dec. 21, 1977. The decision, which is reprinted as an appendix to this memorandum, describes the basic structure of the industry in pertinent part as follows (p. 5a, below):

> "*The Domestics.* Recently, the FCC has encouraged the entry of new carriers into the domestic

communications field. In the early 1970's the Commission began licensing various Domestic Satellite Common Carriers ("DSCCs") and Specialized Common Carriers ("SCCs") to offer, in competition with AT&T, private line service[4] to governmental and large private commercial users. *See, e.g., Specialized Common Carrier Services,* 29 F.C.C.2d 870 (1971); *Domestic Communications Satellite Facilities,* 35 F.C.C.2d 844 (1972).

[4] "'Private line service' provides the large-scale telephone customer with full-time private circuits for the transmission of communications between specified locations. This offers the customer continuous communication without requiring the carrier to establish a new connection for each call or message."

The decision of the District of Columbia Circuit in this case is thus now inconsistent with the common understanding of three other circuits—the Second Circuit as well as the Third and Ninth Circuits—as to the scope of authorized specialized carrier competition.* This conflict between the circuits, which is itself ample warrant for certiorari, is only one of the several independent reasons why plenary review is warranted. See AT&T Pet. 12-18, 25-31.

* *Washington Utils. & Transp. Comm'n* v. *FCC,* 513 F.2d 1142, 1155 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975); *Bell Telephone Company of Pennsylvania* v. *FCC,* 503 F.2d 1250, 1260-61 (3rd Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975). See also *AT&T* v. *FCC,* 539 F.2d 767, 773-74 (D.C. Cir. 1976).

CONCLUSION

For the reasons stated above and in AT&T's petition, certiorari should be granted.

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December 1977

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEPTEMBER TERM, 1977

Nos. 564, 565, 566

(Argued December 7, 1977, Decided December 21, 1977)

DOCKET Nos. 77-4183, 77-4184, 77-4191

WESTERN UNION INTERNATIONAL, INC., RCA Global COMMUNICATIONS, INC., and ITT WORLD COMMUNICATIONS INC., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, United States of AMERICA, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *Respondents,*

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and TRT TELECOMMUNICATIONS CORPORATION, *Intervenors.*

Before: KAUFMAN, *Chief Judge,* MESKILL, *Circuit Judge,* and BARTELS, District Judge.*

Petition for review of Decision and Orders of the Federal Communications Commission, requiring the American Telephone and Telegraph Company to eliminate a discrimination by which it charged the international record car-

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* Of the United States District Court for the Eastern District of New York, sitting by designation.

riers lower rates under contracts than it charged for "like" services provided to other common carriers under tariff.

Denied.

Alvin K. Hellerstein, New York, New York (Alan Kolod and Stroock & Stroock & Lavan, of counsel; Robert E. Conn, Marc N. Epstein of Western Union International Inc., New York, N.Y., of counsel), *for Petitioner Western Union International, Inc.*

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Jack David Smith, Washington, D.C. (Federal Communications Commission, Robert R. Bruce, General Counsel, Daniel M. Armstrong, Associate General Counsel; and U.S. Department of Justice, Washington, D.C. John H. Shenfield, Assistant Attorney General, Barry Grossman, Andrea Limmer, Attorneys of counsel) *for Respondents Federal Communications Commission and United States of America.*

James S. Golden, Bedminster, New Jersey (Edgar Mayfield, Robert E. Boone, Bedminster, New Jersey, and Alfred C. Patroll, Gerald E. Murray, New York, N.Y., of counsel), *for Respondent-Intervenor American Telephone and Telegraph Company.*

Roderick A. Mette, Washington, D.C., *for Intervenor TRT Telecommunications Corporation.*

KAUFMAN, *Chief Judge:*

Just over a century ago, Alexander Graham Bell marked the beginning of a new era with the invention of the telephone. Little did he know that successive generations would treat his "creation" as but the simplest building block in a communications system of extraordinary complexity. We are asked, on this appeal, to unravel some of these intricacies in applying the mandate of § 202(a) of the Communications Act that there be no unjust discrimination in the rates charged for "like" communications services. Several international record carriers ("IRCs"), namely companies carrying messages overseas, petition for review of the Federal Communications Commission's ("FCC") determination that the facilities they lease from the American Telephone and Telegraph Company ("AT&T") are "like" those used by specialized domestic carriers. Pursuant to its finding of likeness, the FCC ordered AT&T to eliminate the existing disparity in rates governing the domestic and international carriers. As a result, AT&T filed tariffs raising the charges paid by the IRCs to parity with the cost to the domestics. We find the FCC's decision to be fully supported by substantial evidence in the record and, accordingly, deny the petition.

I.

To fully understand the factual and legal questions presented by this appeal, a familiarity with the position and function of licensed communications carriers is essential. The facts, which at first blush seem to require the expertise of a DeForest or a Kettering, can upon reflection be readily disentangled.

The International Record Carriers. Petitioners Western Union International, Inc. ("WUI"), RCA Global Communications, Inc. ("RCA"), ITT World Communications Inc. ("ITT"), and intervenor TRT Telecommunications Corp. ("TRT") are international record carriers. As such, they

are empowered by the FCC to provide communications services [1] between the United States and points overseas. Pursuant to their licenses, the IRCs are permitted to transmit and receive messages from and between five so-called "gateway cities." [2] The services of the IRCs cannot extend beyond this rather limited network.

The operating procedure of the IRCs is relatively uncomplicated. Once a message is received in a gateway city, it is then transmitted overseas either through the medium of submarine cables or international satellites. The cables are jointly owned and operated by the IRCs, AT&T, and various foreign governments; the satellites are owned by INTELSTAT, an international consortium from whose American representative the IRCs merely lease "space". To link up to a cable or satellite system, however, the message must first be transmitted to, respectively, "cable heads" or "earth stations." These terminals are jointly owned and used by AT&T and the IRCs.

The IRCs thus have an ownership interest in many of the international transmission facilities. Yet, they are completely dependent on the circuits owned by AT&T which connect one gateway operating center to another ("intercity facilities") and which join each of the five centers to cable heads and earth stations ("entrance facilities"). Pursuant to private contractual agreement, the IRCs lease these "interconnection facilities" from AT&T.[3]

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[1] The IRCs provide telex, telegrams, facsimile, data transmissions, private lines for alternate voice-data traffic and other record-communications services of a sophisticated nature.

[2] New York, San Francisco, Washington, Miami, and New Orleans.

[3] The IRCs are not pleased with this arrangement, and have, for almost a decade, sought to purchase an ownership interest, known as an indefeasible right of use ("IRU"), from AT&T. The FCC, however, has refused to order AT&T to relinquish its control over the circuits.

The Domestics. Recently, the FCC has encouraged the entry of new carriers into the domestic communications field. In the early 1970's the Commission began licensing various Domestic Satellite Common Carriers ("DSCCs") and Specialized Common Carriers ("SCCs") to offer, in competition with AT&T, private line service[4] to governmental and large private commercial users. *See, e.g., Specialized Common Carrier Services,* 29 F.C.C.2d 870 (1971); *Domestic Communications Satellite Facilities,* 35 F.C.C.2d 844 (1972).

In spite of their competitive position vis-a-vis AT&T, the so-called "domestics" often found it necessary to use that company's landline interconnection facilities. They soon discovered, however, that AT&T was restricting their access to its circuits and was charging discriminatory rates for the provision of services. In 1974, after receiving numerous complaints, the FCC ordered AT&T to provide the domestics with interconnection facilities and to promulgate standardized charges. *Bell System Tariff Offerings,* 46 F.C.C.2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Pennsylvania v. FCC,* 503 F. 2d 1250 (3d Cir.), *cert. denied,* 422 U.S. 1026 (1975). AT&T subsequently filed tariffs governing the use of interconnection facilities, and the FCC indicated that it would study the propriety of these rates in light of the widespread concern among the domestics over them. *AT&T Offer of Facilities for Use by Other Common Carriers,* 47 F.C.C.2d 660 (1974). To obviate the need for a full-scale FCC investigation, the FCC and AT&T agreed that AT&T would attempt to settle its differences with the various carriers through negotiation. Because some of the proposed tariffs would have affected

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[4] "Private line service" provides the large-scale telephone customer with full-time private circuits for the transmission of communications between specified locations. This offers the customer continuous communication without requiring the carrier to establish a new connection for each call or message.

aspects of the IRC operation,[5] the international carriers also participated in these discussions.

In due course, a "Settlement Agreement" between the parties was reached, and they requested the FCC to accept their resolution of the dispute. While the Settlement Agreement applied to all of the interconnection facilities used by the domestics, it explicitly excluded from its scope those used by the IRCs, and justified that limitation by reference to the alleged "unique needs" of the international communications network. This exclusion was made at the insistence of the IRCs, presumably because the then existing contractual rates were lower than the rates proposed in the Settlement Agreement.

The FCC Investigation. Because the terms embodied by the Settlement Agreement would lower the rates paid by the domestics for the use of AT&T's facilities and were, accordingly, in the public interest, the FCC accepted the accord on May 7, 1975 "without necessarily approving it." *AT&T Offer of Facilities for Use by Other Common Carriers,* 52 F.C.C.2d 727 (1975). The Commission did, however, take issue with the Agreement's representation that the IRC facilities were unique:

> The Settlement Agreement points out, however, that, notwithstanding the furnishing of similar facilities to other common carriers pursuant to tariffs, entrance and intercity facilities furnished by AT&T to the IRCs continue to be furnished pursuant to contract. In apparent support, the parties noted "the unique needs of the [IRCs] between gateway cities and for entrance channels from cable heads and earth stations to those carriers' central offices in metropolitan areas."

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[5] At issue was a New York Telephone tariff involving certain telegraph-grade facilities made available to the IRCs. *See ITT World Communications Inc.* v. *New York Telephone Co.,* 381 F. Supp. 113 (S.D.N.Y. 1974).

> We still believe that a substantial question exists as to whether we should order AT&T to provide these facilities pursuant to filed tariffs rather than pursuant to contracts, and we will take appropriate action on this matter in a separate order.

52 F.C.C.2d at 735.

Carrying out its stated purpose to investigate whether the interconnection facilities should be governed by tariff, the FCC, pursuant to a "separate order" issued that same day, established a restricted rule-making proceeding, 47 C.F.R. § 1.1201. *Interconnection Facilities Provided to the International Record Carriers,* 52 F.C.C.2d 1014 (1975). The Commission left no doubt that the motivation behind the inquiry was the alleged disparate treatment of the IRCs and the domestic carriers:

> It appears to us that there is no significant difference between the interconnection facilities provided to the IRCs and those provided under tariff to the specialized common carriers including domestic satellite common carriers.

52 F.C.C.2d at 1014.

The IRCs and AT&T [*] filed comments in connection with the rule-making proceeding. They uniformly stressed the fact that the existing contractual arrangement was satisfactory, and several expressed doubts about the FCC's authority to abridge contracts between carriers. None of those commenting referred to any explicit differences in physical facilities, functions, or costs of the two systems. The only "distinction" raised by the IRCs was their tautological assertion that the facilities used by them were

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[*] While AT&T noted that the existing arrangement appeared satisfactory, it also expressed its willingness to file tariffs if the FCC found it to be in the public interest.

"part" of an international communications network, and therefore distinguishable from the "domestic" circuits employed by the domestic carriers. RCA characterized this fact as a difference "between the circumstances" under which the two sets of companies obtained interconnection facilities.[7] WUI, seeking to appear more specific, noted that the "subject contracts are an inherent part of the long-standing submarine cable and satellite earth station consortia of the IRCs and AT&T, totally distinct from the domestic telecommunications industry." ITT similarly described the facilities as "nothing more nor less than U.S. extensions of [the] overseas cables."

On March 23, 1977, the Commission issued its order. It found that the facilities provided to the IRCs were "essentially identical" to those provided to the domestics and that the disparate rate structure was accordingly discriminatory under § 202(a) of the Communications Act. *Interconnection Facilities Provided to the International Record Carriers*, 63 F.C.C.2d 761 (1977). In its decision, the Commission expressed particular concern that the difference in the rate structures for the two systems might well have resulted in the subsidization by domestic customers of the international communications network. The Commission thus ordered AT&T to eliminate this disparity by filing appropriate tariffs, although it explicitly noted that it was expressing "no opinion" with regard to how AT&T might wish to do so. The FCC did comment, however, that if AT&T offered its facilities to all carriers—domestic and international—on identical terms, then the requirement of 47 C.F.R. § 61.38, that rates be justified by underlying costs, would be waived.

The IRCs immediately moved for reconsideration of the FCC decision. While their petitions were pending, AT&T

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[7] A similar comment was voiced by TRT, which noted that the two sets of facilities were supplied "under significantly different circumstances."

sought clarification of its obligation under the order. In particular, the company was having difficulty devising a nondiscriminatory tariff to cover several peculiar communications "systems" aptly characterized by the FCC as "quirks". These included the Washington to Moscow "Hotline", a Florida-Cuba cable circuit serving foreign diplomats in Havana, the Department of Defense's AUTOVON network, and a facility used by the National Aeronautics and Space Administration for the tracking and monitoring of space satellites. In an effort to resolve these difficulties, four meetings were held in the spring of 1977 between AT&T and the FCC. The merits of the FCC order were never discussed. Approximately one month after the last of these meetings, the Commission supplied all interested parties with a summary of the discussions that took place.

On May 26, AT&T filed tariffs for the IRC interconnection circuits, choosing to eliminate the discrimination by raising the rates charged the IRCs to parity with those charged the domestics. Initially, this new cost schedule was to become effective in late August but was subsequently deferred to October 28. This delay permitted the FCC to hold a public meeting on September 7 to settle some of the outstanding issues affecting the tariffs. At that gathering an AT&T representative, responding to IRC comments that the tariffs should reflect cost differences between the IRC and domestic facilities, noted that "[e]ntrance and transiting facilities [for IRC's] are physically and essentially the same as those provided to domestic[s]. We cannot justify a lower charge to the IRC's."[8]

The difficulties between the IRCs and AT&T remained unresolved following the meeting and, on October 25, 1977, the FCC filed its order denying the still pending application for reconsideration of its earlier decision. *Intercon-*

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[8] Minutes, dated September 9, 1977, of public meeting held at FCC offices on September 7.

nection Facilities Provided to the International Record Carriers. FCC 77-694 (Reconsideration Order). The Commission based its determination not only on the initial comments provided by the IRCs, but also on their submissions supporting the request for reconsideration. The FCC, in examining this "voluminous administrative record",[9] found little that would alter its earlier conclusions. In submitting their petition for reconsideration, the IRCs had made several specific claims of differences between the two systems. They had noted special geographical limitations on the locations of gateway cities, earth stations and cable heads and further observed that the IRC circuits were engineered to meet special international operating requirements. In a lengthy opinion, the FCC rejected each of these contentions. It noted, for example, that geographic limitations have never been deemed sufficient as a distinguishing factors, for if it were, virtually any local service would become "unique". Regarding the international operating requirements the Commission observed that many domestic circuits were engineered to meet such specifications, and, in any event, the alleged differences were not substantial enough to make the two types of services "unlike".[10]

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[9] The FCC noted that it had before it: its original decision and the accompanying record; the IRCs' petitions for reconsideration of that decision; the IRCs' petitions against AT&T's proposed tariffs; all other miscellaneous letters and comments filed by the IRCs; AT&T's responsive pleading to the IRC petitions to reject the tariffs; the summary of the meetings between the FCC and AT&T; and the summary of the September 7, 1977 public meeting. Reconsideration Order, ¶ 43.

[10] In the reconsideration order, the FCC also examined the tariff filed by AT&T, noting that the IRCs had failed to demonstrate why the tariff should be rejected or suspended. The Commission found that its waiver of cost justification for the tariff was appropriate, since absent a waiver, the discrimination might well have continued while cost figures were developed. *See National Association of Motor Bus Owners* v. *FCC,* 460 F.2d 561, 568 (2d Cir. 1972).

While the IRCs protested that the finding of "likeness" was based on an inadequate record, and demanded an evidentiary hearing, the Commission felt that nothing would be gained by extending an already exhaustive investigation.

II.

The petitioners attempt to gloss over the language of § 202(a) of the Communications Act, 47 U.S.C. § 202(a), which forbids "unjust or unreasonable discrimination in charges" in connection with the provision of "like" communication services. By its terms, the statute embodies an absolute obligation to prevent such discrimination in the public interest regardless of the needs of particular users or other policy considerations. *American Trucking Associations, Inc.* v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). The issue before us simply is whether the FCC's finding of "likeness" with regard to the domestic and IRC facilities is supported by substantial evidence. We have no difficulty in finding that it is.

In May 1975, when the FCC first commenced its rulemaking proceeding, it noted that there were no "significant differences" between the domestic and IRC interconnection facilities. In fact, this similarity was readily apparent from tariff and contractual provisions governing, respectively, domestic and international communications. The facilities for both employed "voice-grade" circuits possessing similar bandwidths. They performed essentially the same functions:[11] the entrance facilities interconnected

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[11] "Functional similarity" has been used in the past as a criterion for determining likeness for section 202(a) purposes. *See, e.g., American Trucking Associations, Inc.* v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967); *Investigation into the Lawfulness of Tariff FCC No. 267, Offering a Dataphone Digital Service Between Five Cities*, 62 F.C.C. 2d 774, 796-97 (1977). The Commission has always make "likeness" determinations on a case-by-case basis, although it indicates that it will soon attempt to develop general standards. Reconsideration Order, ¶ 12 n. 11.

either earth stations,[12] microwave terminals, or cable heads to operating offices, while the intercity facilities in both instances permitted communications between and among operating offices in different cities. Given this functional similarity, the FCC had good cause to suspect that there was little justification for the large difference in the rates charged for the two facilities.

In the ensuing two years—while the FCC came to a final decision and studied the requests for reconsideration—the IRCs were given and took advantage of numerous opportunities to distinguish the two sets of circuits. Their arguments rested on the facile and conclusory observation that the IRC interconnections were "part" of the international system, and thus "unique," although some went so far as to acknowledge that the two sets of facilities, in terms of their physical and functional characteristics, might well be similar.[13] Throughout the entire period, no significant differences between the two systems came to light. In fact, AT&T, which built and operates both systems, observed that the facilities are "physically and essentially the same."[14]

We fail to see what additional facts would have been elicited in hearings given that these proceedings have already become unduly extended with repeated opportunities to supply information and air the problem. Admittedly, there has been no evidentiary hearing. The type of

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[12] The IRCs argue that the domestic carriers "normally" use their own microwave circuits to link their operating centers to earth stations. Whether or not that is the case—for no evidence is given in support of that claim—some domestics do use AT&T entrance facilities, as is clearly demonstrated by the Settlement Agreement. *AT&T Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C. 2d 727, 727-28 (1975).

[13] RCA noted, for example, that "in some cases there may well be no significant difference between [domestic] facilities generally and IRC facilities."

[14] Minutes, *supra* note 8.

hearing required however, must depend on the circumstances of each case. *RCA Global Communications, Inc.* v. *FCC*, 559 F.2d 881 (2d Cir. 1977). The IRCs have failed to demonstrate that the extensive notice and comment procedures afforded them did not provide ample opportunity to explore the alleged unique characteristics of the IRC interconnection circuits.

Our determination is buttressed by the fact that once the FCC demonstrated a basis for its determination of likeness, the burden shifted to the IRCs to disprove the discrimination in its favor. *See Trailways of New England, Inc.* v. *CAB*, 412 F.2d 926, 932 n.13 (1st Cir. 1969). Afforded the chance on repeated occasions, they have failed to do so. In fact, they have to this day made only one argument to justify the discrimination: a difference in the costs of the two systems. Since that issue was never raised in the proceedings before the Commission, however, it cannot be brought up at this juncture of the case for the first time.[15] *Gross* v. *FCC*, 480 F.2d 1288, 1290-91 n.5 (2d Cir. 1973). Moreover, the limited evidence on this issue—the statement of the AT&T representative at the September 7, 1977 meeting—suggests the absence of any disparities in this regard.

In any event, the FCC is about to conduct a hearing into the cost justification for the tariff rates proposed under the Settlement Agreement, and the IRCs will be able to participate fully in that inquiry. Should there be a finding that those rates are unduly high, the IRCs would be able to recover overcharges plus interest. 47 U.S.C. §§ 208-09. Any cost differences between the two systems would hopefully also be brought to light in these hearings.

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[15] The IRCs raised the issue of cost differences only in connection with the validity of the tariff filed by AT&T, which of course involves a question that is plainly separable from the finding of likeness. And concerning the tariff, the Commission properly decided to waive cost justification so as to move expeditiously in eliminating the discrimination.

III.

The petitioners also charge that the FCC proceedings were irreparably tainted by four *ex parte* meetings that took place between officials of the Commission and AT&T representatives for the purpose of discussing the so-called "quirks", to which we have previously referred. They argue that the FCC investigation was designated as a "restricted rule-making proceding", and under the Commission's own rules, FCC personnel were prohibited from entertaining *ex parte* presentations. 47 C.F.R. § 1.1225(b). We find, however, that these meetings were not prohibited under the FCC rules, for the AT&T representatives' involvement did not constitute "presentations". As defined in 47 C.F.R. § 1.1201(f), "presentations" are only "communication[s] going to the merits or outcome of any aspect of a restricted proceeding." 47 C.F.R. § 1.1201(f). The discussions with AT&T were intended solely to help that company implement the FCC order in specific, troublesome areas. Nothing said in these meetings was intended to affect the order itself in any manner, or to influence the Commission regarding the petition for reconsideration. Indeed, on the one occasion when AT&T raised the issue of possible cost differences between the IRC and domestic circuits, an FCC official cautioned that the subject could not be discussed, and that AT&T should file a petition for reconsideration if it wished to challenge the order itself.

In any event, little prejudice to the IRCs, if any, could have arisen from the meetings. The scope of discussion was confined to several minor idiosyncracies in the international circuits, affecting in no way the great bulk of the circuits covered by the FCC's order. In addition, the IRCs have been in possession of a summary of the meetings since June 24, 1977, and were explicitly invited to comment on this matter by the FCC.[16] Under these circumstances,

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[16] RCA was the only IRC to respond directly to the FCC request. WUI also commented on the *ex parte* meetings, but did so only in

the claim of prejudice to the IRCs is totally without merit. *Compare Home Box Office, Inc.* v. *FCC*, No. 75-1280, slip op. (D.C. Cir. March 25, 1977), *cert. denied*, 46 U.S.L.W. 3190 (October 3, 1977).

IV.

Finally, the IRCs attempt to characterize the FCC's order as one that "abrogates" the private contractual agreements existing between them and AT&T and, as such, goes beyond the Commission's statutory authority. Admittedly, the Commission does not have any express authority to countermand intercarrier contractual agreements. *See Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). And while the Commission contends that this power should be implied from the statutory framework, to do so would require a finding that the proposed action is in the public interest. 63 F.C.C. 2d at 765-66. That finding is absent here.

Whatever the precise scope of the FCC's power, it is evident that the Commission has not abrogated any intercarrier contracts. Nothing in its order required that AT&T alter the rates it charged the IRCs. To the contrary, the order explicitly noted that it was merely requiring AT&T to eliminate the discrimination between the domestic and IRC circuits. It was thus open to AT&T to alter the rates it was charging the domestics by bringing them down to the fee levels charged in the IRC contracts. The FCC order further specified that so long as the rates for the two systems were equalized—by whatever means—the Commission would not require cost justification. Petitioners' contention that AT&T was forced to raise the IRC rates due to a lack of cost figures is therefore incorrect.[17]

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a petition to reject the AT&T tariff. It contended that the meetings "exacerbated" the FCC's alleged preconceptions regarding the merits of this controversy.

[17] Comments by two of the petitioners indicate that the choice offered AT&T was a real one. During the September 7 meeting

As must be obvious to the interested parties, we have carefully reviewed this substantial record. We find no merit in any of the IRCs' other contentions and therefore deny the petition.

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between AT&T and the IRCs, RCA Vice-President Asher H. Ende noted that "[i]n Docket 20452 [the] FCC did not require filing of this new tariff, but only that AT&T eliminate unlawful discrimination . . . . The Commission left room for a compromise." And an attorney for WUI, Marc N. Epstein, noted in a letter to AT&T dated September 26, 1977, that "the Commission did not explicitly require the exact tariffs AT&T filed. It required only the elimination of an alleged unlawful discrimination. Therefore, the [FCC] Staff took the position that there may be room to compromise or narrow the issues. In light of the foregoing, AT&T's attempts to place the onus of its unwillingnes to discuss settlement upon the Commission is misplaced."